APPENDIX

Supreme Court of the United States

October Term, ~~1968~~ ~~1969~~ 1970

No. ~~1226~~ 1014

STATE OF NORTH CAROLINA,

Appellant,

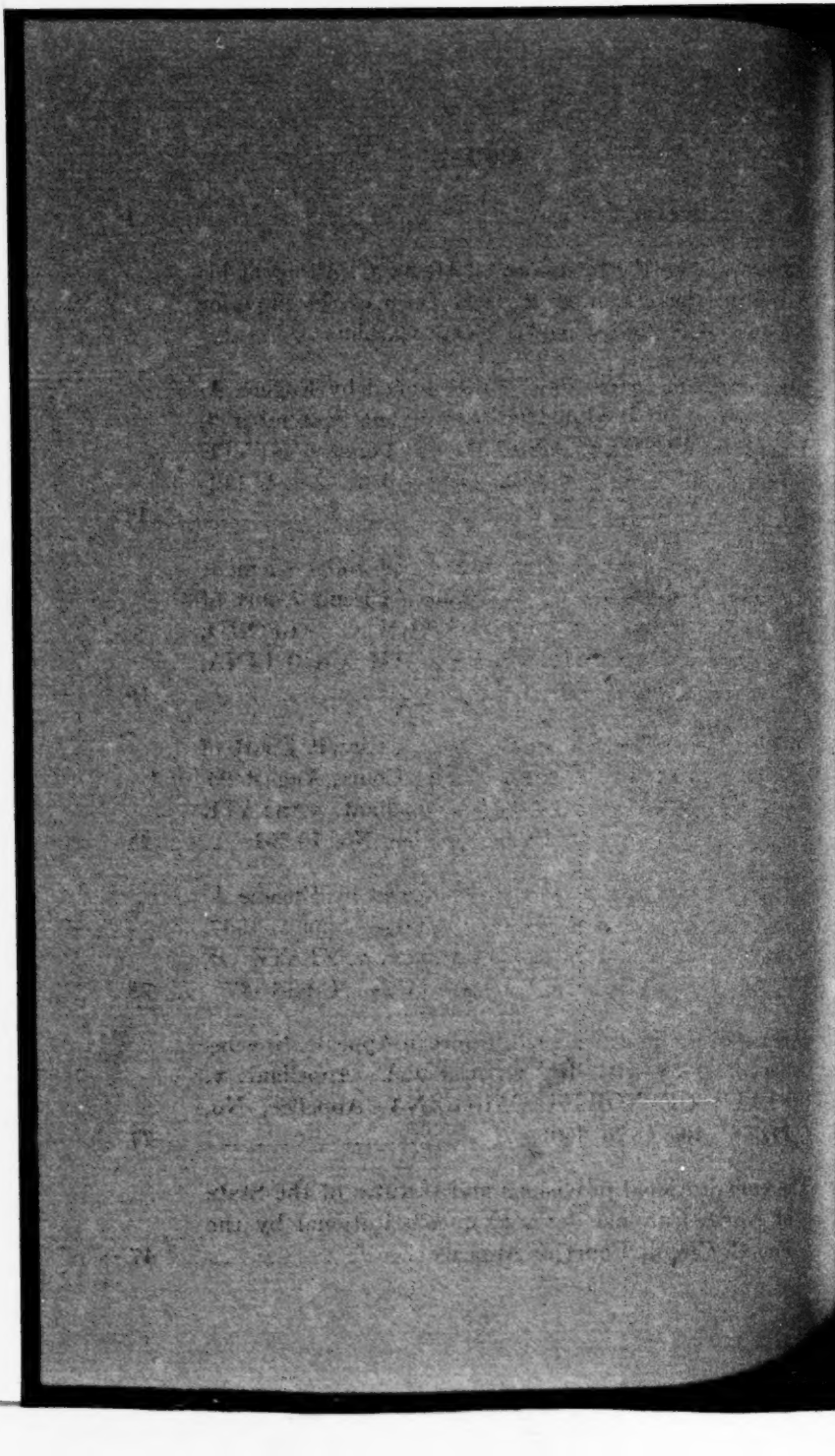
vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED FEBRUARY 19, 1969
PROBABLE JURISDICTION NOTED APRIL 7, 1969.



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Supreme Court of the United States

October Term, 1968

No. 1064

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

RELEVANT DOCKET ENTRIES

(1) December 10, 1963. Judgment in the case of STATE v. HENRY C. ALFORD, December 2, 1963 Term, Forsyth County Superior Court, Winston-Salem, North Carolina.

(2) March 18, 1964. Petition for Writ of Certiorari filed in the Supreme Court of North Carolina.

(3) March 24, 1964. Petition for Writ of Certiorari denied with instructions that the case be remanded to the Superior Court of Forsyth County to appoint counsel and conduct a post-conviction hearing.

(4) December 7, 1964. Post-conviction proceeding held at the December 7, 1964 Criminal Session of the Forsyth County Superior Court before the Honorable Frank M. Armstrong.

(5) March 19, 1965. Order entered by Honorable Frank M. Armstrong, Judge Presiding at the December 7, 1964 Criminal Session of the Forsyth County Superior Court, denying post-conviction relief.

(6) March 26, 1965. Petition for Writ of Mandamus filed in the Forsyth County Superior Court.

(7) April 14, 1965. Petition for Writ of Mandamus denied by the Forsyth County Superior Court.

(8) June 16, 1965. Application for Writ of Habeas Corpus filed in the United States District Court for the Middle District of North Carolina.

(9) June 18, 1965. Order signed by Eugene A. Gordon, United States District Judge in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65, dismissing the application for Writ of Habeas Corpus due to lack of jurisdiction.

(10) July 7, 1965. Order signed by Eugene A. Gordon, United States District Judge, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65, reinstating the application for Writ of Habeas Corpus due to newly acquired jurisdiction.

(11) July 12, 1965. Return to Habeas Corpus and Return to Show Cause filed by the Respondent, State of North Carolina, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65.

(12) July 26, 1965. Proof of Service and Answer of Respondent in opposition to the petition for Writ of Habeas Corpus and Motion to Dismiss filed by the Respondent, State of North Carolina, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65.

(13) September 3, 1965. Memorandum Opinion and Order signed by Eugene A. Gordon, United States District Judge, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65.

(14) October 26, 1965. Notice of Appeal filed in the United States District Court for the Middle District of North

Carolina in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65.

(15) November 24, 1965. Memorandum Opinion and Order signed by Eugene A. Gordon, United States District Judge, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-112-G-65.

(16) December 8, 1965. Application for Writ of Habeas Corpus filed in the United States Court of Appeals for the Fourth Circuit.

(17) August 3, 1966. Memorandum Decision signed by Chief Judge Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit, in the case of HENRY C. ALFORD, Appellant, v. STATE OF NORTH CAROLINA, Appellee, No. 220.

(18) August 25, 1966. Memorandum Decision of the United States Court of Appeals for the Fourth Circuit, signed by a panel of said Court, in the case of HENRY C. ALFORD, Appellant, v. STATE OF NORTH CAROLINA, Appellee, No. 10,391.

(19) June 1, 1967. Memorandum Opinion and Order signed by Eugene A. Gordon, United States District Judge, in the case of HENRY C. ALFORD, Petitioner, v. STATE OF NORTH CAROLINA, Respondent, No. C-98-G-67.

(20) April 4, 1968. Certificate of Probable Cause signed by Chief Judge Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit, in the case of HENRY C. ALFORD, Appellant, v. STATE OF NORTH CAROLINA, Appellee, No. 11,598.

(21) November 26, 1968. Opinion of the United States Court of Appeals for the Fourth Circuit in the case of HENRY C. ALFORD, Appellant, v. STATE OF NORTH CAROLINA, Appellee, No. 11,598 (405 F.2d 340).

(22) December 23, 1968. Notice of Appeal filed by the State of North Carolina in the United States Court of Appeals for the Fourth Circuit in the case of HENRY C. ALFORD, Appellant, v. STATE OF NORTH CAROLINA, Appellee, No. 11,598.

(23) December 23, 1968. Motion of the State of North Carolina for Stay of Mandate pending appeal filed in the United States Court of Appeals for the Fourth Circuit.

(24) December 27, 1968. Order of the United States Court of Appeals for the Fourth Circuit Staying Mandate.

(25) January 8, 1969. Motion for Bail filed in the United States Court of Appeals for the Fourth Circuit.

(26) January 13, 1969. Answer to Motion for Bail filed in the United States Court of Appeals for the Fourth Circuit.

(27) January 20, 1969. Order of the United States Court of Appeals for the Fourth Circuit denying appellee's Motion for Bail.

(28) February 17, 1969. Statement as to Jurisdiction filed in the Supreme Court of the United States by the State of North Carolina in the case of the STATE OF NORTH CAROLINA, Appellant, v. HENRY C. ALFORD, Appellee, No. 1064, October Term, 1968.

(29) April 7, 1969. Probable Jurisdiction noted by the Supreme Court of the United States in the case of the STATE OF NORTH CAROLINA, Appellant, v. HENRY C. ALFORD, Appellee, No. 1064, October Term, 1968.

. . . . . .

EXCERPTS FROM TESTIMONY OF HENRY C. ALFORD

TRANSCRIPT OF TESTIMONY

IN THE SUPERIOR COURT, FORSYTH COUNTY, NORTH CAROLINA

DECEMBER 2, 1963 TERM

MR. LUPTON: Your Honor, in this case Henry C. Alford is charged with the murder of Nathaniel Young on or about the 22nd day of November, 1963. Henry C. Alford, what is your plea?

MR. CRUMPLER: We tender a plea of guilty to second degree murder.

THE COURT: Let the record show that when the case was called for trial the defendant, through his attorney, tendered to the State a plea of guilty to second degree murder, which plea is accepted by the State.

MR. CRUMPLER: Thank you, Your Honor.

[pp. 1-2]

. . . . . .

THE COURT: Well, is there anything else?

MR. CRUMPLER: Your Honor, if you'll give me just a second. Your Honor, the defendant wishes to take the stand.

THE COURT: All right. Let him be sworn.

HENRY C. ALFORD, having been first duly sworn on The Holy Bible, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CRUMPLER:

Q. Henry, you have asked to take the stand in order that you can make whatever statement you want. Go ahead and tell His Honor what you would like to say.

A. Yes, sir. Well, the night—well, on that night I was walking down to Nathaniel's house and met Georgia and she said

she wanted a little drink of whiskey and couldn't find any, and I said that we'll go to a friend's [p. 13] house on 7½, and when we got there the radio was playing or records, somewhere, and we danced, and nobody was arguing in the house, and so—and I talked to Georgia and—I didn't have but $1 'cause I bought a half a pint of whiskey, and she wanted me to have more money. I got my check but I didn't have it with me. It was left in my wardrobe when I changed my work clothes. And I went to Claremont—I carried her coat—they got after me for the coat and then—they didn't get the coat. I went up to 7th Street and come back to Greenwood and I come back down Greenwood and I went home and seen the check was in the billfold. I wanted to know—and I came back out and said—Ruby told me to go across the street and so I collected her $3 and she had tried to collect it and he wouldn't give it to her, and there was no admission about no gun or shooting over there, and his girl friend he lives with came to the door and said, "The law is around over there at your house," and I said, "What are they over there for?" And she said she didn't know, and I said, "Well, let me go out the back door," and I went out the back door and said, "I'm going to cash my check," and I got a cab and went to cash my check, and so when I come back I met Betty. Betty said the law had been to my house and got Ruby and the shotgun, and I said, "What was they [p. 14] doing with the shotgun?" And Betty said she didn't know but that they had got Ruby and the shotgun. And so I gave Betty a dime to call the police headquarters and ask why Ruby was up there and see how much bond was she under. I thought she was going to jail for whiskey, but they didn't have no bond, and they asked her where is Henry C. Alford at, asked Betty on the phone, and we started up the street and—she said she didn't know—and we went up the street, going up Cleveland, and went to my house, and there wasn't no whiskey in the house but the gun was gone like she said, and so we went back across Cleveland and bought

a drink of whiskey to her cousin's house and we came back and I said, "Well, what are they going to do with her?" first, and I says, "You go down the street," and so I was walking down Cleveland and Betty went down towards the officer's car—she lives down that way about three doors from me, from where I live, and so I walked down there and the officer came up by himself and he—and he called me—I walked on the left-hand side of Cleveland and he said, "Hey, fellow, what is your name?" And I told him, and he wanted to know where I was going and I told him to Ruby McGill's, and I was walking on Cleveland and he drove up behind me and stopped me again and said for me to come here a minute in the car, and at that time he was [p. 15] by himself and he walked around to the door and I got in the car and he said, "What is your name?" and I told him, and he said, "Where do you live?" and I told him, 1112 East 10½, and by that time I heard one of the officers talking on the two-way radio about Ruby saying I had on a black cap and black coat on the two-way radio, and some more officers come and right behind them come some more and stopped and—Joe McFadden and another one—there was four officer's cars at one time there—and Joe McFadden come over there and says, "That's Henry Alford," and they arrested me, and I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.

MR. CRUMPLER: Your Honor, it's going to be necessary —I have, as best I could, set these facts out in this affidavit, but I want to ask him a few questions.

Q. Now, you have consulted with me on several occasions before we came to court?

A. Yes, sir.

Q. And that is two or three times for the last two or three terms? [p. 16]

A. Yes, sir.

Q. And during that time you had the privilege of being—seeing me and also see your sister and the other friends that have been around—the right to visit you and help prepare your case?

A. Yes, sir.

Q. And, also, I have advised you, as your attorney, of the various degrees of murder and the difference between second and first degree and your rights of appeal and the court's power and discretion in each of those cases?

A. Yes, sir.

Q. And including the right of a jury to find you not guilty, and to the right to plead before the Governor of the State of North Carolina?

A. Yes, sir.

Q. And you authorized me to tender a plea of guilty to second degree murder before the court?

A. Yes, sir.

Q. And in doing that, that you have again affirmed your decision on that point?

A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty. [p. 17]

THE COURT: Well, he said that you plead guilty to second degree murder.

A. Yes, sir.

THE COURT: Is that your desire now?

A. Yes sir, I plead guilty on—from the circumstances that he told me.

MR. CRUMPLER: I don't know what to do with the man, Your Honor.

THE COURT: You are court-appointed?

MR. CRUMPLER: Yes, sir. Your Honor, if the Court would allow me I —

THE COURT: I want to ask him some questions myself up here. You were born down in Rocky Mount on May 18, 1918 weren't you?

A. Yes, sir.

THE COURT: June 18, 1918?

A. Yes, sir.

THE COURT: Now, how many times have you served penitentiary sentences in your life?

A. About three times.

THE COURT: How many people have you been charged with murdering in your life?

A. One accident.

THE COURT: Where was that?

A. In Virginia. [p. 18]

THE COURT: Well, you killed that person? You served a sentence for that?

A. Yes, sir.

THE COURT: How long did you serve for killing that man?

A. Six years.

THE COURT: What was your sentence?

A. Ten.

THE COURT: And you got out in six years?

A. Yes, sir.

THE COURT: Well now, how many times have you been convicted of armed robbery?

A. Nine times.

THE COURT: What else have you been convicted of?

A. Whiskey and stuff like that.

THE COURT: What did you serve on those?

A. I pulled time for hauling stolen goods in Robeson County.

THE COURT: How much time did you make in that case?

A. Four years altogether.

THE COURT: What else have you been convicted of?

A. I don't know.

THE COURT: Well, you said you served three sentences.

A. Well, one was for forgery. I wrote some checks.

THE COURT: How much time did you serve for forgery?

[p. 19]

A. Two years.

THE COURT: Well, you didn't come to Winston-Salem till 1960 did you?

A. No, sir.

THE COURT: And since you came to Winston-Salem you have been convicted of carrying a concealed weapon here?

A. Here?

THE COURT: Yes, on August 19, 1960.

A. Nothing but a pocket knife.

THE COURT: Just a pocket knife?

A. Yes.

THE COURT: Well, you were convicted of assault, charged in two cases of assault with a deadly weapon in 1960 when you came here weren't you?

A. No, sir. I don't know anything about that.

THE COURT: Well, you were up before Judge Same on October 2, 1963 for cursing and abusing an officer?

A. Yes sir, I was up for that.

THE COURT: And you were found guilty of it?

A. Yes. I pleaded guilty.

THE COURT: And you were up for disorderly conduct in October; is that right?

A. Yes.

THE COURT: And you were up for assault on some [p. 20] woman in September; is that right?

A. Yes.

THE COURT: And you have been convicted of driving an automobile intoxicated and driving after your license were revoked and violation of the prohibition law all since you came here in 1960?

A. Yes.

THE COURT: All right. Step down.

MR. CRUMPLER: That is all of the evidence that I have on his behalf, Your Honor.

THE COURT: Well, let the defendant stand up. It is the judgment of the Court that he be confined in the State's Prison for a term of thirty years. [p. 21]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-112-G-65
STATE OF NORTH CAROLINA, Respondent	)	

MEMORANDUM OPINION AND ORDER

Petitioner, Henry C. Alford, a prisoner of the State of North Carolina, hereinafter referred to as petitioner, filed with this Court a petition for a writ of habeas corpus, and accompanied the petition with an affidavit of poverty. The petition was filed *pro se* and an order has heretofore been entered permitting the petition to be filed without the prepayment of costs or fees, or security therefor. Petitioner contends that he was denied due process of law in that his plea of guilty to a charge of second-degree murder was not voluntary; that he remained in the custody of law enforcement officers for a period of forty-two hours before a warrant was issued for his arrest; that his house was illegally searched and the alleged murder weapon was illegally seized; and that he was not allowed to have witnesses at his trial. The Court denies the relief requested by the petitioner for reasons hereinafter set forth.

Petitioner filed his first application for a writ of habeas corpus with this Court on June 16, 1965. On June 18, 1965, the Court entered an order dismissing the application as petitioner was incarcerated at Raleigh, North Carolina, which is outside the territorial jurisdiction of this Court. On June 21, 1965, the Court received a paper-writing which informed the

Court that petitioner had been transferred to Blanche, North Carolina, within the territorial jurisdiction of this Court and that he was then incarcerated there. Thereafter, on July 7, 1965, the Court entered an order stating that it considered the paper-writing a motion to reconsider the petition of the petitioner which the Court granted and further ordered the petition to be filed.

Petitioner was taken into custody by law enforcement officers in Winston-Salem, North Carolina, on November 22, 1963, and a warrant for petitioner's arrest was issued on November 23, 1963. Subsequently, at the December 2, 1963, Term of Superior Court of Forsyth County, petitioner was indicted for murder, and Fred G. Crumpler was appointed attorney for the petitioner by the Superior Court. On December 10, 1963, petitioner's case was called for trial in the Superior Court of Forsyth County, and upon a plea of guilty to second-degree murder, petitioner was sentenced to thirty years imprisonment. No appeal was taken. Subsequently, petitioner applied for a writ of certiorari from the Supreme Court of North Carolina, but the writ was denied on March 24, 1964, and the case remanded to the end that the petitioner be given a post-conviction hearing in the Superior Court of Forsyth County pursuant to North Carolina General Statutes, Chapter 15, Article 22, Section 217. At the December 7, 1964, Term of Superior Court of Forsyth County, petitioner was given a hearing before Judge Frank M. Armstrong. Thereafter, on March 19, 1965, Judge Armstrong entered an order containing Findings of Fact and Conclusions of Law denying petitioner any relief. Petitioner then requested a writ of mandamus from the Superior Court of Forsyth County, and the same was denied on April 14, 1965. Petitioner then applied for another post-conviction hearing, and this was denied on May 3, 1965.

After the post-conviction hearing at the December 7, 1964, Term of Superior Court of Forsyth County and the rendition of the order by Judge Armstrong on March 19, 1965, there is no evidence that the petitioner applied for a writ of certiorari

in order that the Supreme Court of North Carolina might review the hearing and decision. Where the avenue for review by the Supreme Court of North Carolina is still open, a failure to request such review may be fatal to the Court's jurisdiction as the petitioner would have failed to exhaust his state remedies. 28 U.S.C.A. § 2254: *Rhinehart v. North Carolina*, 4 Cir., 344 F. 2d 114 (1965). Under Chapter 15, Section 222, of the General Statutes of North Carolina, it is provided that the writ of certiorari must be applied for within sixty days after the entry of judgment. The petitioner has neglected to pursue his remedy in this respect within the time allotted and is now precluded from obtaining such writ. Therefore, it appears that the petitioner has exhausted all state remedies in that certiorari is not now available to him.

The petitioner alleged that he has been denied due process of law as guaranteed by the Constitution in that, first, in his trial in the Superior Court of Forsyth County, his plea of guilty was not voluntary, but was coerced by his court-appointed attorney, Fred G. Crumpler, and the Clerk of the Superior Court; second, that he remained in custody of law enforcement officers for a period of forty-two hours before a warrant for his arrest was issued; third, that his house was illegally searched and the alleged murder weapon was illegally seized; and fourth, that he was not allowed to have witnesses at his trial.

The Court is of the opinion that if the petitioner's plea of guilty is found to be voluntary, then his other three contentions are not sufficient to merit him relief. Entry of a valid plea of guilty and a conviction based on such plea waives all nonjurisdictional defects such as alleged by petitioner in his second, third and fourth contentions. *Hoffman v. United States*, 9 Cir., 327 F. 2d 489 (1964); *Adkins v. United States*, 8 Cir., 298 F. 2d 842 (1962), cert, den. 370 U. S. 954, 82 S. Ct. 1604, 8 L. Ed. 2d 819; *Bloombaum v. United States*, 4 Cir., 211 F. 2d 944 (1954). Being of the opinion that the petitioner's plea was voluntary, the Court will only consider in this Memorandum the first contention of the petitioner.

This Court may deny petitioner a hearing and accept the findings of fact of the state court if petitioner has been given a full and fair hearing in the state court and its findings of fact meet the required standards. *Townsend v. Sain*, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *United States v. Wilkins*, 2 Cir., 333 F. 2d 742 (1964), cert. den. 379 U. S. 977, ... S. Ct. ....., ...L. Ed. 2d .....; *United States ex rel. Hall v. People of State of Illinois*, 7 Cir., 329 F. 2d 354 (1964), cert. den. 379 U. S. 891, ... S. Ct. ....., ...L. Ed. 2d .....; *Davis v. Holman*, 237 F. Supp. 490 (M.D. Ala. 1965); *Mills v. Holman*, 225 F. Supp. 886 (M.D. Ala. 1964).

The Supreme Court of the United States in *Townsend v. Sain*, 373 U. S. 293, 312, 313, sets forth the rules and standards for federal courts to follow in accepting the findings of fact of the state court by saying:

> "* * * In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.
>
> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

With these standards in mind and after giving consideration to the record as a whole, including the transcript of the post-conviction hearing, the Court finds that the merits of the petitioner's contention that his plea of guilty was not voluntary has been properly and judiciously resolved after a full and

fair hearing, and the Findings of Fact and Conclusions of Law made by Judge Armstrong are fully supported by the record as a whole. At the post-conviction hearing, the petitioner was represented by court-appointed counsel, and the following persons testified: Fred G. Crumpler, court appointed attorney for petitioner at his trial and who petitioner alleges coerced him into making a plea of guilty; Mrs. Christine Green, sister of the petitioner; Robert Haskins, Deputy Clerk of the Superior Court of Forsyth County and who petitioner alleges also coerced him into entering a plea of guilty; and the petitioner. The material facts were developed at the hearing, and no allegation of newly discovered evidence was made at the time of the hearing or now. The Court can find no reason that would indicate that the petitioner was not given a full and fair hearing, and concludes that the post-conviction hearing and the findings of fact from that hearing meet all the required tests. Therefore, the Court adopts the Findings of Fact of the state court.

Judge Frank M. Armstrong, who presided over the post-conviction hearing of the petitioner at the December 7, 1964, Term of Superior Court of Forsyth County in his order dated March 19, 1965, found that the petitioner's plea of guilty was voluntary. Judge Armstrong stated:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to

him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so.

"That the petitioner willingly, knowingly and understandingly entered a plea of guilty to murder in the second degree on December 10, 1963, in the Superior Court of Forsyth County and was sentenced to serve a term of thirty years in the State's Prison."

The Court is cognizant of the fact that it can only adopt the facts found by the state court, and the Court must supply the applicable law. *Townsend v. Sain, supra.* However, by adopting the state court's findings as to the voluntariness of

the petitioner's plea of guilty, the conclusion follows that the sentence was imposed after a valid guilty plea and the plea was sufficient without more to warrant a conviction. *Armpriester v. United States*, 4 Cir., 256 F. 2d 294 (1958), cert. den. 358 U. S. 856, 79 S. Ct. 88, 3 L. Ed. 2d 90.

The Court finds that petitioner has not been denied his constitutional rights; therefore, the relief sought is denied.

ORDER

IT IS ORDERED that the petition for writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed.

IT IS FURTHER ORDERED that the Clerk forward a certified copy of this Memorandum and Order to the Petitioner at the place of his confinement.

EUGENE A. GORDON
United States District Judge

A True Copy
Teste
Herman Amasa Smith, Clerk
By: Bobbie D. Wyont
Deputy Clerk
September 3, 1965

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 220

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, has petitioned in forma pauperis for a writ of habeas corpus.

Alford's unsuccessful petition in the District Court has been noted in another case (No. 10,391). I have obtained a supplement to the record in No. 10,391 and after reviewing the files, transcript and other papers I have concluded that Alford is not entitled to a writ of habeas corpus.

Alford's petition is based upon several contentions. We turn first to the claim that his guilty plea was the product of fear and coercion as well as the ineffective assistance of counsel.

The record includes a transcript of a plenary hearing in a state court during Alford's unsuccessful attempt to avail himself of North Carolina's postconviction relief statute. The transcript reveals that Alford was represented by an experienced criminal lawyer who conferred with him on "numerous" occasions before trial. (Tr. 3).

There is a conflict in the testimony over why Alford actually pleaded guilty but the state court found that he did so because his attorney wisely advised him to plead guilty to second degree murder and escape the possibility of capital punishment. The state court also found that the attorney interviewed all the witnesses Alford named with the exception of one, who could not be located. (Supp. to Rec. preceding p. 37). The state judge found that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact and I see no reason to disagree with it.

Having found that Alford's guilty plea was voluntarily made upon the competent advice of counsel, there is no reason to inquire into the claims Alford raises regarding illegal search and seizure, denial of witnesses and illegal detention. See *Hoffman v. United States*, 9 Cir., 327 F. 2d 489.

The District Court reached the same conclusion after a thorough explanation of the facts. (Supp. to Rec. pp. 37-44). I am of the opinion that the District Court's interpretation of the applicable facts and law is correct and therefore it is unnecessary to repeat either in detail.

The petitioner is allowed to proceed in forma pauperis but his petition is denied. Pursuant to 28 U.S.C.A. § 2241 (a) this order shall be entered in the records of the United States District Court for the Middle District of North Carolina.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,391

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, appeals in forma pauperis from an order of the District Court.

Alford was convicted upon a plea of guilty of second degree murder and sentenced to thirty years by the Superior Court of Forsyth County. He did not appeal, but later instituted postconviction proceedings in the state court to collaterally attack the validity of his conviction.

On December 7, 1864, Alford was granted a plenary hearing by the state court. At the hearing he was represented by court-appointed counsel who urged that Alford's guilty plea was the product of fear and coercion and the inadequate representation of counsel. The state court denied Alford's petition for relief. Thereafter Alford petitioned the United States District Court for the Middle District of North Carolina (Gordon, J.) for a writ of habeas corpus. The District Court entered a show cause order and the State answered. Included in the answer was a transcript of the state-court hearing and the opinion of the state judge. On the basis of the record the

District Court determined that Alford had not been denied any right which would justify the issuance of the writ and dismissed the petition.

Forty-eight days after the District Court's order denying the writ was entered Alford filed a notice of appeal. The District Court considered the notice as "a motion in the cause to allow an appeal and a motion for a new hearing." (Rec. 4). Both were denied for the reasons set forth in the District Court's memorandum order. (Rec. 3-8). From that denial Alford appeals in forma pauperis.

The District Court was correct in denying Alford's motions. The record in the case clearly shows that he failed to attempt an appeal until well after the thirty-day time limit had expired. Moreover, there was no reason given why the case should be reopened in the District Court. That Court does not have to entertain successive writs. 28 U.S.C. §§ 2244, 2253.

There is no danger of injustice based upon a procedural technicality in this case. Alford has also submitted a petition for a writ of habeas corpus to a judge of this Court and that petition will be considered on the merits.

Accordingly the appeal is dismissed and a certificate of probable cause is denied.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Harrison L. Winter
United States Circuit Judge

J. Braxton Craven, Jr.
United States Circuit Judge

A true copy, Teste:
Maurice S. Dean, Clerk,
U.S. Court of Appeals
for the Fourth Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-98-G-67
STATE OF NORTH CAROLINA Respondent	)	

MEMORANDUM OPINION AND ORDER

GORDON, District Judge

The petitioner, Henry C. Alford, a prisoner of the State of North Carolina, has filed with this Court still another petition for a writ of habeas corpus pursuant to the provisions of Title 28, U.S.C. § 2254, and accompanies the petition with an affidavit of poverty. The petition was filed *pro se* and an order has been entered permitting the petition filed without the prepayment of cost for fees or security therefor. The petitioner contends his constitutional rights were deprived in that:

1. His home was searched without a search warrant being issued.

2. He was denied his right to counsel at an interrogation.

3. He was denied the effective assistance of counsel.

The voluminous files in this case reflect that this is the third petition for a writ of habeas corpus directed to the Federal Courts to be dealt with on its merits; this in addition to numerous collateral attacks directed through state court channels.

On September 7, 1965, his first petition for a writ of habeas

corpus was denied in a Memorandum Opinion from this Court which dealt sufficiently with petitioner's trial and state post-conviction hearing that they need not be reiterated here.

Since September 7, 1965, petitioner's motion to appeal from the above decision after the lapse of the requisite time limit was denied by Memorandum and Order dated November 24, 1965. This denial was affirmed on appeal.[1] On December 8, 1965, a petition for a writ of habeas corpus was filed directly with the United States Court of Appeals for the Fourth Circuit. In a Memorandum Decision dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. Numerous other petitions and motions have been before this Court, but do not affect the merits of this present petition and require no discussion.

Petitioner raises substantially the same contentions in this petition as have been raised in the two previous federal petitions. Both Memorandum Decisions denying petitioner relief have held that his guilty plea was voluntary. This determination precludes any consideration of the first and second contentions in the present petition because the voluntary guilty plea waives all defenses and non-jurisdictional defects occurring in any prior stage of the proceedings against the person so pleading. *U.S. v. McMann*, 2 Cir., 349 F. 2d 1018 (1965); *Busby v. Holman*, 5 Cir., 356 F. 2d 75 (1966); *Bloombaum v. U.S.*, 4 Cir., 211 F. 2d 944 (1954).

In his third contention, the petitioner raises a question as to the competency of his counsel and the effectiveness of his assistance. Although Judge Haynsworth touched upon this allegation, it will be dealt with on its merits.

It is now well settled that a federal hearing is unnecessary if the petitioner received a full and fair evidentiary hearing in a state post conviction proceeding in accordance with the standards set out in *Townsend v. Sain*, 372 U.S. 293 (1963)[2]. This

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1U.S.C.A., 4 Cir., Case #10,391, Memorandum Decision filed August 25, 1966.

2*Duckett v. Steiner*, 4 Cir., 332 F. 2d 178 (1964).

court can accept the findings of fact of the state court to which facts this Court must apply federal law.

On the basis of the post-conviction hearing, Judge Frank M. Armstrong entered an order on March 19, 1965, which made certain applicable findings of fact:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford, who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer, with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of

the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so."

Upon this set of facts it is conclusive that petitioner's counsel was not constitutionally defective under the applicable standards. *Tompa v. Virginia*, 4 Cir., 331 F. 2d 552 (1964).

This Court, having found petitioner has not been denied his constitutional rights, denies the petition and the relief sought therein.

ORDER

IT IS ORDERED that the petition for the writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed. IT IS FURTHER ORDERED THAT the Clerk forward a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

June 1, 1967

A True Copy
Teste:
Herman Amasa Smith, Clerk

By:

Judy A. Mabe
Deputy Clerk

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 11,598

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued June 18, 1968. Decided November 26, 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges.

Doris R. Bray (Court-assigned counsel) [Smith, Moore, Smith, Schell & Hunter on brief] for Appellant, and Jacob L. Safron, Staff Attorney, Office of the Attorney General of North Carolina (T. W. Bruton, Attorney General of North Carolina, on brief) for Appellee.

WINTER, Circuit Judge:

Petitioner seeks review of the summary denial of his petition for a writ of habeas corpus. Because we conclude that,

under the guiding principles of *United States v. Jackson*, 390 U. S. 570 (1968),[1] enunciated subsequent to the judgment of the district court, petitioner's plea of guilty to the crime of second degree murder was demonstrably coerced, the judgment appealed from will be reversed and the district court directed to issue the writ, staying its effect for a reasonable period to enable North Carolina to retry petitioner if it be so advised.

Petitioner was indicted by a grand jury of the State of North Carolina for murder in the first degree. With the approval of the state, he pleaded guilty to murder in the second degree and was sentenced on December 10, 1963, to a term of thirty years.

In due course, he sought and was granted a post-conviction hearing, pursuant to N.C. Gen. Stat. §§ 15-217 - 15-222 (1965). The state judge who conducted the hearing rejected petitioner's various constitutional contentions, including the claim that his guilty plea had been involuntarily induced. After the unsuccessful pursuit of various state remedies, petitioner sought a writ of habeas corpus from the district court. On September 3, 1965, the district judge denied the relief sought, expressly adopting the facts concerning the voluntariness of petitioner's plea as previously found by the state judge in the post-conviction proceedings. After the time for appeal to this Court had expired, petitioner filed with the district court a purported notice of appeal, which was treated by the district court as a motion for a certificate of probable cause and a motion for a new hearing. Both motions were denied, and we dismissed pe-

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1. See also, *Pope v. United States*, 392 U. S. 651 (1968) (per curiam), which applied the principle of *Jackson* to the death penalty provisions of the Federal Bank Robbery Act, 18 U.S.C. §2113(e) (1964). We note that the Court in *Pope* invalidated the capital punishment provision with no discussion of any peculiarities in the legislative history of the Bank Robbery Act such as those which occupied the Court in *Jackson* in relation to the Federal Kidnaping Act. Indeed, the legislative history of the Bank Robbery Act shows that as *originally enacted* imprisonment and capital punishment were alternative punishments, and that these alternatives were unaccompanied by a severability clause, 48 Stat. 783. Thus, *Pope* has precedential value in determining how statutes should be brought into conformity with *Jackson*, as a matter of statutory construction.

titioner's appeal on the ground that it had not been perfected within the prescribed thirty-day time limit. *Alford v. North Carolina*, No. 10,391 (4 Cir. August 25, 1966) (Mem.).

Concurrently, a petition for a writ of habeas corpus was filed in this Court and was denied by Chief Judge Haynsworth, who also rejected petitioner's various constitutional contentions.[2] Again, in 1967, petitioner sought a writ of habeas corpus from the district court and, again, relief was denied.

In acting upon the 1967 petition, the district judge apparently considered that inquiry into the voluntariness of petitioner's guilty plea was foreclosed by the prior consideration of this question by the district court and by Chief Judge Haynsworth. The district judge, therefore, dealt primarily with, and rejected, petitioner's contention that he had been deprived of the effective assistance of counsel.[3]

— I —

The State of North Carolina argues that petitioner has not presented either to this Court or to the district court any new factual allegations which should disturb the prior and unanimous findings of fact concerning the voluntariness of the plea of guilt. The rule of the federal courts, expressed in 28 U.S.C. § 2244 (1967 Supp.),[4] is not to entertain successive and repeti-

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2. It should be noted, however, that the record before Chief Judge Haynsworth apparently did not contain a transcript of petitioner's trial. See, *Alford v. North Carolina*, Misc. No. 220 (4 Cir. August 3, 1966) (Mem.) As we shall see, the trial transcript casts significant light upon the question of the voluntariness of petitioner's plea. Additionally, Chief Judge Haynsworth's disposition of the petition preceded the decision in *United States v. Jackson*, 390 U. S. 570 (1968).

3. In view of our disposition of this appeal, we need consider neither this contention nor petitioner's other constitutional challenges urged upon the district court, which were an alleged unlawful search of petitioner's home and an alleged denial of the right to counsel at an interrogation. We deal only with the question of voluntariness of petitioner's guilty plea.

4. 28 U.S.C. (1967 Supp.):
"§2244. Finality of determination.

• • • • •

(b) When after an evidentiary hearing on the merits or a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the

tive habeas corpus petitions if the grounds asserted to support the petition have been previously decided on the merits, and the ends of justice would not be advanced by plenary consideration of the subsequent application. See, *Sanders v. United States*, 373 U. S. 1, 11, 15-19 (1963). We do not depart from this doctrine. However, the instant appeal deals primarily not with new factual allegations but, rather, with what is admittedly a new question of law, namely, the applicability and effect of the Supreme Court's recent decision in the *Jackson* case. To the extent that the appeal raises this question of law, what was said in *Sanders* is significant:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to show that the ends of justice would be served by permitting the redetermination of the ground * * * If purely legal questions are involved, the applicant may be entitled to a new hearing *upon showing an intervening change in the law* or some other justification for having failed to raise a crucial point or argument in the prior application. * * * the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized." 373 U. S., at 16-17. (emphasis added.) [5]

To the extent that proper disposition of the instant appeal depends upon factual considerations, this is the first time that the transcript of petitioner's original trial and of his state post-conviction proceedings have both been before the full

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United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such a person need not be entertained by a court of the United States or a justice or judge of the United States *unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ*, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." (emphasis added.)

5. While *Sanders* spoke of proceedings under 28 U.S.C. §2255, the present federal substitute for habeas corpus, the considerations it discussed are no less applicable to habeas corpus by a prisoner incarcerated under state process.

court. Res judicata has no place in habeas corpus proceedings. *Fay v. Noia*, 372 U. S. 391 (1963); *Sanders v. United States*, *supra*. Especially is this so when there is reason to reappraise the facts because of the introduction of a new pertinent rule of law. Thus, we conclude that we are not precluded from a reconsideration of petitioner's constitutional argument based upon the *Jackson* case, or his factual argument based upon a consideration of the entire record of the proceedings, alone, or in the light of *Jackson*.

— II —

There can be little question but that petitioner tendered his plea of guilty at a time that he was the subject of impermissible burdens condemned in the *Jackson* case. *Jackson* held invalid the death penalty provision of the Federal Kidnaping Act,[6] on the basis that it had a chilling effect upon the Sixth Amendment right to a jury trial, and the Fifth Amendment right "not to plead guilty," i.e., the privilege against self-incrimination. Of course, *Jackson* was a case which arose under the Fifth and Six Amendments as such, while the instant case, a state prosecution, concerns the Fourteenth Amendment; but the test of what violates the Fourteenth Amendment in this area is the same.[7]

The federal statute in *Jackson* essentially created the special offense of "kidnaping where the victim has not been liberated

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6. 18 U.S.C. (1964 Ed.)
"§1201. Transportation.
(a) Whosoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) *by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend*, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (emphasis added.)

7. The Sixth Amendment right of trial by jury is made applicable to the states by the Fourteenth Amendment. *Parker v. Gladden*, 385 U. S. 363 (1966); *Duncan v. Louisiana*, 391 U. S. 145 (1968). The Fourteenth Amendment outlaws coerced guilty pleas in state prosecutions. See, e.g., *Herman v. Claudy*, 350 U. S. 116 (1956). A coerced guilty plea is, of course, an infringement upon the right not to plead guilty, i.e., the privilege against self-incrimination.

unharmed" punishable by imprisonment for a term of years or for life or by death, upon the discretionary, yet binding, recommendation of the jury. Where a victim has not been liberated unharmed, only an accused *who exercised his right to a jury determination of guilt or innocense* faced the prospect of the possible imposition of the death penalty. This prospect was sufficient, in the view of the Court, to render the death penalty provision unconstitutional on the two separate grounds: (1) the fact that the jury alone could impose the death penalty tended to deter the exercise of the right to a jury trial guaranteed by the Sixth Amendment, and (2) the statutory scheme tended to encourage pleas of guilty or, stated otherwise, to discourage assertion of the Fifth Amendment right not to plead guilty.

North Carolina law presently prescribes the death penalty for murder in the first degree,[8] as well as certain other crimes.[9] In each instance the penalty prescribed is death; in each instance also the jury may, in its discretion, obligatorily recommend that punishment be imprisonment for life. North Carolina does not permit an accused who pleads not guilty to waive a jury trial.[10] The accused may avoid a jury trial only if he pleads guilty and, by statute, a plea of guilty may not result

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8. N. C. Gen. Stat. §14-17 (1953):
"Murder in the first and second degree defined; punishment. — A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and *shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison*, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." (emphasis added.)

9. N. C. Gen. Stat. §14-21 (1953) (forcible rape of female of age twelve years or more or carnal knowledge of female under twelve); N. C. Gen. Stat §14-52 (1953) (burglary in the first degree); N. C. Gen. Stat. §14-58 (1953) (arson).

10. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court***." N. C. Const., Art. I, §13. This right cannot be waived. *State v. Muse*, 219 N. C. 226, 13 S. E. 2d 229 (1941); *State v. Hill*, 209 N. C. 53, 182 S. E. 716 (1935).

in a punishment more severe than life imprisonment.[11] Thus, a person accused of a capital crime in North Carolina is faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment. It was precisely this sort of inhibitory or chilling effect upon the exercise of constitutional rights which the Supreme Court condemned in *Jackson*, because a statutory scheme such as that employed by North Carolina "needlessly encourages" guilty pleas and jury waivers.[12]

North Carolina seeks to distinguish the instant case from *Jackson* on the ground that under the Federal Kidnaping Act the jury possessed the authority to *increase* the punishment to be imposed upon the defendant beyond that which the court could impose; while under North Carolina law the statutorily-prescribed penalty for murder in the first degree and certain other crimes is death and the jury is merely given the power to *mitigate* the harshness of the maximum penalty. We are not persuaded that the difference amounts to a distinction. Under both statutes it is the jury which determines guilt, and that jury alone which, in its discretion, decides if the death penalty is to be exacted. As to imposition or non-imposition of the death penalty the jury's determination is exclusive, conclusive and final. Of greater significance, in *Jackson* the argument was

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11. An accused who pleads guilty to one of the four capital crimes is to be sentenced to life imprisonment. N. C. Gen. Stat. §15-162.1(a),(b), (1965). In the instant case, petitioner was allowed to plead guilty to murder in the second degree with the concurrence of the state and the trial court. The maximum penalty for this offense, to which appellant was sentenced, is thirty years. N. C. Gen. Stat. §14-17 (1953).

12. Indeed, it is arguable that the North Carolina statutory scheme is more objectionable than the former Federal Kidnaping Act. Under the federal statute, the accused had three choices: he could plead guilty, not guilty and accept a jury trial, or not guilty and, with the consent of the prosecutor and the court, waive a jury trial. Thus, an accused could simultaneously avoid the death penalty and assert his innocence in a guilt-determining proceeding, namely, a bench trial. The accused in North Carolina has no such option; *if he asserts his innocence at all*, he risks capital punishment. Therefore, unlike the federal scheme, *every* defendant in a North Carolina capital case is, in the phraseology of *Jackson*, "needlessly *encourage* [d]" to forego his rights to a jury trial and not to plead guilty.

advanced that the Federal Kidnaping Act's penalty provisions operated to "mitigate the severity of punishment" and that it was, therefore, immaterial that the Act "may have the incidental effect of inducing defendants not to contest in full measure" their culpability. The Court explicitly rejected this contention, stating that the consequent chilling effect upon the exercise of constitutional rights was "unnecessary and therefore excessive." 390 U. S. 570, at 582. *Jackson* thus renders unavailing North Carolina's argument.

Nor do we find persuasive North Carolina's further argument that in *Jackson* the Court did not question the constitutionality of the death penalty *per se*. Undoubtedly this is true, but the Court in *Jackson* was careful to state that whatever the power to impose a death penalty "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." 390 U. S. 570, at 583. The clear import of *Jackson* is that if North Carolina wishes to retain the death penalty it must do so by means different from those presently enacted. That there are other means is self-evident. See, e.g., *United States v. Jackson*, 390 U. S., at 582-83.

We are thus constrained to disagree with the dictum of the Supreme Court of North Carolina in *State v. Peele*, 274 N. C. 106, 161 S.E. 2d 568 (1968), that there are "certain material differences" between the Federal Kidnaping Act and the North Carolina statutes,[13] so that "Jackson is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances." (161 S.E. 2d, at 572). To the contrary, we conclude that in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may *not*, under *Jackson*, be imposed under any circumstances.[14]

13. But see, *Laboy v. State of New Jersey*, 266 F.S. 581 (D. N.J. 1967), which reached an opposite conclusion with respect to the New Jersey statutes which in turn are like the North Carolina statutes.

14. As Chief Judge Haynsworth notes in dissent, South Carolina has sought to avoid the *Jackson* problem by holding in *State v. Harper*, ----- S.C. -----,

Since the argument in this case, the Supreme Court of New Jersey has decided *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968). Because of the similarity between the North Carolina and New Jersey statutes, the case is of significance to us. Under New Jersey law an individual accused of murder has essentially two choices: (1) he may assert his innocence by demanding a trial by jury, in which case, if convicted, he may be sentenced to death, or (2) he may enter a plea non vult, or nolo contendere, which, if accepted, carries a maximum penalty of life imprisonment. In *Forcella* this statutory scheme was assailed under *Jackson*.

By a split decision the New Jersey Court held the *Jackson* rationale not controlling. This result was influenced by several considerations, but the real basis of decision was, we believe, an erroneous reading of *Jackson*. The majority pointed out that under New Jersey law only a jury could determine guilt or innocence if that issue were contested. Coupled with this fact, the majority read *Jackson* to render the Sixth Amendment right applicable only when there are two alternative guilt-determining processes and the jury trial alternative produces greater risks for the accused, and further, to hold that both the Fifth and Sixth Amendment rights must be violated before the statutory scheme would become vulnerable to constitutional attack.

We do not find this reading persuasive. Under a strict *Jackson*-type statute, such as the Federal Kidnaping Act, an accused who pleads not guilty and seeks a bench trial waives

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162 S.E. 2d 712 (1968), that the South Carolina statute, which makes a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy (§17-553.4, 1967 Supp. to 1962 Code of Laws), is invalid and by requiring the submission of the issue of punishment to the jury in every case. We express no view whether the laws of South Carolina, as so construed, comport with *Jackson*. We note in passing that the purported solution to the *Jackson* problem arrived at by the South Carolina court runs directly counter to the current national trend which has produced a marked curtailment in the employment of the death penalty device. However, it is enough for the purpose of this case that North Carolina has not amended its statutes, nor has its Supreme Court undertaken to limit them in the light of *Jackson*.

only his right to a jury trial. An accused who pleads guilty (or non vult) in either the *Jackson* or *Forcella* situations simultaneously foregoes *both* his right to a jury trial and his right not to plead guilty.

Jackson arose in the context of a challenge to the indictment before the defendant entered any plea. Since Jackson had thus given no indication that he might ultimately wish to waive his right to a jury trial or his right to assert his innocence, the Court had before it the effect of the federal act on both of Jackson's rights. We think it incorrect to say that they were "intertwined" so that the majority in *Jackson* did not "say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment." *State v. Forcella,* 245 A.2d 185-186.

Like the dissenters in *Forcella,* we read *Jackson* to treat the Fifth and Sixth Amendments to be independent constitutional underpinnings for the result. It follows therefore, that the New Jersey statutory scheme, like that of North Carolina, is more conspicuously invalid than the federal statute in *Jackson,* because under the federal statute an accused could assert his innocence and avoid a death sentence by a bench trial, while in New Jersey avoidance of a death sentence may be accomplished only by waiver of the right to plead not guilty *and* by waiver of the right to a jury trial. *Jackson* condemned the needless encouragement of guilty pleas and waiver of jury trials. Greater encouragement is inevitable in a New Jersey-type statute than in the federal statutes held invalid, in part, in *Jackson* and *Pope.* Thus, we decline to follow *Forcella.*

Jackson arose by a motion to quash an indictment grounded on the Federal Kidnaping Act. The case at bar arises, *inter alia,* from an attack upon the voluntariness of a plea of guilty. While *Jackson* clearly stands for the proposition that the death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty, it falls short of holding that the North Carolina stat-

utory provisions for the imposition of capital punishment are in themselves inherently coercive.[15] In *Jackson* the Court stated that the mere fact that an accused had pleaded guilty to a charge under the Federal Kidnaping Act did not necessarily render his plea involuntary and require reversal of his conviction.[16]

By a parity of reasoning, we think that a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law. *Jackson* by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. *Jackson* thus defined a new factor to be given weight in determining the voluntariness of a plea—a factor present in full measure in the instant case because of the North Carolina statutory scheme.[17] As we read *Jackson*, we must determine the extent to which, if at all, petitioner was moved to plead

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15. "• • • the evil in the • • • statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." 390 U. S., at 583. (emphasis in original.) See also, *Gilmore v. California*, 364 F. 2d 916, 918 (9 Cir. 1966); *LaBoy v. New Jersey*, 266 F. S. 581, 584-85 (D. N.J. 1967)

16. See, 390 U. S., at 583 & n. 25. The Court also referred to its opinion in *Griffin v. California*, 380 U. S. 609 (1965), which held that a defendant's failure to testify could not be commented upon by the prosecution or the trial court The Court noted that it "obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled." *Id.*, at 583, n. 25.

17. It is immaterial in our view that petitioner pleaded guilty to murder in the second degree rather than to murder in the first degree under which he was charged. For all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder. Of course, if the state had determined that it would only prosecute for second degree murder, *and this fact had been known to the petitioner before his plea was entered*, then it could hardly be maintained that his guilty plea was a product of a fear of the death penalty.

guilty because of the incentive which the North Carolina statutory scheme supplied to achieve that result.[18]

— III —

In the light of the principles we distill from *Jackson*, we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was made involuntarily, and that petitioner is entitled to relief by habeas corpus.[19]

The record is uncontradicted that from the time that petitioner entered his plea he professed his innocence of any homicide. No court has ever found that he pleaded guilty other than to avoid possible imposition of the death penalty.[20] During the course of his first appearance before the court, petitioner stated:

To us the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense. This is not to say, however, that where, as here, the plea is accepted to a lesser included offense, there is not a higher burden of proof upon one attacking the judgment entered thereon to show that the plea was the result of an invidious consideration than if the plea were to the degree of the crime which would support capital punishment. The very process of downgrading the charge may well suggest that the plea was motivated by factors other than a fear of death; certainly, it is circumstantial evidence that punishment by death was not a substantial possibility in view of the prosecutor's acquiescence in significant concessions. From a strictly evidentiary standpoint, we think this case is not the ordinary one and petitioner has met the burden of proof placed on him.

18. To the extent that *Gilmore v. California*, 364 F. 2d 916 (9 Cir. 1966), cited to us by North Carolina, may be read as holding that a statutorily supplied incentive to plead guilty so as to avoid the death penalty may not as a matter of law render the plea involuntary, we think that its holding has been undermined by *Jackson*.

19. The dissent argues that we perform a futile act in granting post-conviction relief because, if it asumed that North Carolina corrects the *Jackson* defect in its statutory scheme, petitioner "if he is well advised" will merely plead guilty once again to second degree murder. Of course, North Carolina may, at some future time, enact a capital punishment statute which is not constitutionally infirm under *Jackson*. However, we do not agree with the implied premise of the dissenting opinion that petitioner originally pleaded guilty because of the evidence informally arrayed against him, rather than because of the threat of an unconstitutionally imposed death penalty. As the text will show, petitioner, immediately after hearing the prosecutor's claim of what it would prove, responded, "I ain't shot no man."

20. In denying petitioner's application for a writ of habeas corpus to this Court, Chief Judge Haynsworth so characterized the state post-conviction judge's findings:

> "* * * I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and *I just pleaded guilty because they said if I didn't they would gas me for it*, and that is all." (emphasis added.)

Later, when questioned by his attorney concerning whether he still desired to plead guilty, petitioner reiterated his innocence, and gave voice to his fear of what the jury might do:

> "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

The trial judge inquired whether petitioner still wished to plead guilty, and the question evoked the following response:

> "Yes, sir, I plead guilty on—from the circumstances that he told me."

The plain meaning of petitioner's statements at the time that he entered his plea was fully corroborated by the testimony of his trial counsel when the latter was called as a witness at the state post-conviction hearing. The attorney, Mr. Crumpler, described what had transpired as follows:

> "The understanding that I had when the trial proceeded—the Judge—Judge Johnston either asked him or I asked Judge Johnston to ask him to make sure that his plea was clear to him, and it's my memory—to the best of

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"* * * there is a conflict in the testimony over why Alford actually pleaded guilty but the *state court found* that he did so because his attorney wisely advised him to plead guilty to second degree murder and *escape the possibility of capital punishment.* * * * *The state judge found* that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and *because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact.*" *Alford v. North Carolina*, No. 220 (4 Cir. August 3, 1966) (Mem.). (emphasis added.)

my memory he stated that he didn't do what he was charged of but he was going to plead guilty, or plead guilty to second degree *because he didn't want to run the risk of losing his life.* I don't pretend that that is verbatim, but that is to the best of my recollection." (emphasis added.)

The petitioner also testified in the state post-conviction proceedings, and his testimony then was perfectly consistent with what he had said at the time that he entered his plea:

> "Mr. Crumpler said *if I didn't enter a plea I would surely get a death sentence.* That is what he told me. And my sister and a policeman, Joe McFadden, my first cousin, he was there, too. And I can't read or write, and he just run over it because he knew I couldn't understand it and *he said if I didn't take a plea of second degree I would surely get a death sentence.* And my sister said I'd better take it,[21] and he told Judge Johnston that I told him to give me thirty years, said I don't know how to try this case. Then, nobody didn't say that I done that crime, nobody in court said I did the crime." (emphasis added.)

We think that there is no question but that the incentive supplied to petitioner to plead guilty by the North Carolina

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21. Alford's sister, Mrs. Christine Greene, related her version of this encounter in a affidavit filed in the Superior Court of Forsyth County, North Carolina, dated June 19, 1965. It reads in pertinent part as follows:

"Mr. Crumpler then advised Henry that the Solicitor had intimated that he would recommend that the Court accept a plea of guilty to second degree murder and Mr. Crumpler explained that the maximum punishment for second degree murder was thirty years and that in his, Mr. Crumpler's opinion, the Court would probably sentence Henry for thirty years due to the nature of the case. Henry at first stated that he wanted to plead guilty to second degree murder; then a few minutes later, he changed his mind. I explained to Henry that if he got thirty years, I could still visit him and *it would be better than running a risk of losing his life.* Henry, at this time, was undecided and Mr. Crumpler left the cell and left us with Henry. A few minutes later, he returned and advised Henry that whatever decision he made would have to be his own decision and that no one could make the decision for him. Mr. Crumpler also advised that he could make either decision, but that we would have to reach some decision because the case was about to be called for trial. *Henry then said that he didn't kill the deceased person, but that he did not want to be killed either, and at this time stated that he wanted to enter a plea of guilty to second degree murder.*" (emphasis added.)

statutory scheme was the primary motivating force to effect tender of the plea, especially since throughout the proceedings petitioner has protested his innocence.[22] Further evidentiary hearings are unnecessary. Under *Jackson*, therefore, the judgment entered on the plea cannot stand.

REVERSED and REMANDED

HAYNSWORTH, Chief Judge, dissenting:

I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum statutory punishment for which is imprisonment for not more than thirty years. In the historical context of North Carolina's statutes, this is a distinction of importance.

In *United States v. Jackson*, 390 U. S. 570, the Supreme Court held unconstitutional a statutory scheme under which capital punishment could be imposed only by a jury after a trial upon a plea of not guilty. The risk of death, which would be encountered only if the defendant pled not guilty and demanded a jury trial was held to be an impermissible burden upon the exercise of the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to a jury trial. The Supreme Court concluded that the capital punishment amendment of the "Lindbergh Act" was thus unconstitutional, but the remainder of the statute, as enacted earlier, was left intact. Dismissal of the indictment, therefore, was vacated and the case remanded, so that the prisoner would be required to exercise his choices as to his plea and to a jury trial in a context in which the risk of death would not burden one set of choices.

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22. Whether petitioner is in reality guilty or innocent has not been judicially determined. In any event, petitioner has never conceded his guilt. That fact alone should have precluded plea bargaining under the rule announced in *Bailey v. MacDougall*, 392 F. 2d 155, 158 n. 7 (4 Cir. 1968), "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiations must be limited to the quantum of punishment for an *admittedly* guilty defendant." (emphasis supplied.) This case is thus an inappropriate vehicle in which to discuss plea bargaining.

Here the defendant clearly stated when he tendered his plea that he was substantially motivated by the fear of execution if he entered a plea of not guilty. His contemporaneous claim of innocence may be suspect,[1] but the circumstances fully support his conscious purpose to avoid the risk of capital punishment. Under the circumstances, had the plea been to first degree murder, I would agree with the majority that the conviction should be set aside, for the victim of the very pressures *Jackson* sought to avoid ought not to be left to suffer their consequences.

The plea of guilty to murder in the second degree, however, was not the product of the constitutional infirmity in the Statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sentence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degree would not have differed in the slightest from the pressure he actually experienced.

Alford will be subject to retrial, of course. North Carolina may remove the infirmity from its statute, so that when Alford is rearraigned, he will be in the same position he was in initially.[2] If he is well advised, he will again tender a plea

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1. Before the guilty plea was accepted, there was an informal statement of the State's evidence, including declarations by the defendant a few moments before the homicide of his purpose to kill the victim and admissions, shortly thereafter, that he had done it. If the State's case at a trial was as strong as the statement indicated, the defendant would have little hope of acquittal.

2. I do not here consider the impact which Green v. United States, 355 U. S. 184, and Patton v. North Carolina, 4 Cir., 381 F. 2d 636, might have upon retrial. See n.4 infra.

of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute which bears no causal relationship to the entry of the plea which the majority strikes.

Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of a more likely sentence of life imprisonment than of the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

Such plea-bargaining, when the defendant is properly represented is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

There is nothing in *Jackson* which intimates disapproval of that kind of plea-bargaining. Its absence, or the absence of agreement, is the thing that produced the *Jackson* dilemma. Yet, that is all that happened here. Alford successfully bargained for a plea to a lesser, included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the statute not been constitutionally defec-

tive. He may be expected to do the same thing again at his retrial. In *Jackson* the statutory defect created the issue, here it has no causal connection with it.

There is the fact that everyone involved in the negotiation of Alford's plea reasonably believed that North Carolina's statute validly authorized a jury to impose capital punishment upon a verdict of guilty of first degree murder, while limiting the court to the imposition of a sentence of life imprisonment upon a plea of guilty to that offense. Their misconception, revealed by *Jackson*, is relevant here, only if the effect of *Jackson* is an invalidation of the death penalty in North Carolina. We have no present basis for a conclusion that it is, as a comparative analysis of the Federal Kidnapping Act and North Carolina's murder statutes will demonstrate.

The Supreme Court in *Jackson* carefully considered the history of the Lindbergh Kidnapping Act. As originally enacted it permitted no more than life imprisonment. Later, however, it was amended to permit a jury, in its discretion, to impose capital punishment if the victim was not released unharmed. It was the amendment which created the difficulty and the pressure to forego a defendant's Fifth and Six Amendment rights. It was the amendment which the Court struck, for it reasonably concluded that Congress would prefer that the statute be left in its original form than for the nation to be left with no federal kidnapping statute.

The history of North Carolina's murder statutes contrasts starkly with that of the Lindbergh Act. Until 1949 the only penalty for first degree murder in North Carolina was death. Neither judge nor jury had any discretion about it, though juries have ways of avoiding the harsh strictures of such laws, and many a defendant whom the jury believed guilty of first degree murder must have been found guilty of a lesser, included offense. In 1949, however, N. C. Gen. Stat, § 14-17 was amended to permit the jury in its discretion to attach to its verdict of guilty a recommendation of mercy. Such a recom-

mendation required the court to impose a sentence of life imprisonment. Four years later, in 1953, § 15-162.1 (b) was enacted making a plea of guilty, when accepted by the court, the equivalent of a verdict of guilty with a recommendation of mercy and prescibing the imposition of a life sentence.

The amendments to the North Carolina statutes, like the amendment of the Lindbergh Act, introduced the *Jackson* infirmity. Though the North Carolina amendments were ameliorating, because they introduced the infirmity into the statutory scheme, they may be rationally said to be unconstitutional, just as the amendment in *Jackson*, leaving intact North Carolina's preamendment statute.

The Supreme Court of South Carolina recently dealt with the *Jackson* problem in *State v. Harper*, ... S. C. ....., 162 S.E. 2d 712, (1968).

It concluded that *Jackson* invalidated South Carolina's statute, similar to North Carolina's § 15-162.1 (b), making a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy. It prescribed the submission of the question of punishment to a jury in every capital case, regardless of the plea.

There is no reason to suppose that North Carolina's Supreme Court will not come to a similar resolution of the *Jackson* problem. It has indicated no antipathy toward capital punishment.[3] The death penalty has been an integral part of the laws of North Carolina relating to murder since it first became a state, and it is not suggested that it is unconstitutional *per se*. Since it was the 1949 and 1953 Acts which introduced the *Jackson* infirmity, it may be expected that the courts of North Carolina will invalidate them, or portions of them, rather than all or parts of her earlier integrated statute.

3. The contrary is indicated by its holding that a prosecutor, by asking for life imprisonment only, may not limit the jury's discretion to impose capital punishment. State v. Denny, 249 N. C. 113; 105 S. E. 2d 446 (1958). The jury had directed life imprisonment, but on the prisoner's appeal the Court ordered a new trial at which the jury's discretion to impose capital punishment would not be limited as it had been by prosecutor and judge.

Whatever the courts of North Carolina or her legislature may do to meet the problem, we now have no right to lay the infirmity to North Carolina's hoary authorization of the death penalty rather than to the later statutes which injected into the scheme the *Jackson* deprivations of Fifth and Sixth Amendment rights. There is presently no basis for our assuming the demise of capital punishment in North Carolina.[4]

The fact of the misconception of North Carolina's lawyers and judges that her statutes validly authorized the imposition of the death penalty only by a jury would be relevant, therefore, only if the plea was to the capital offense. In such a case, had the defendant known at the time that his plea would not limit his exposure to capital punishment, he might well have chosen to plead not guilty. That misconception is wholly irrelevant, however, when the plea is to a noncapital offense. Knowledge at the time that the court might impose capital punishment upon a plea of guilty to the capital crime could have had no possible effect upon his choice to plead guilty to the lesser, noncapital offense.

I think, therefore, that *Jackson* requires the retrial in North Carolina only of those defendants, who, for the purpose of avoiding risk of capital punishment, entered guilty pleas to the capital offense.[5]

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4. This conclusion is unaffected by Pope v. United States, 392 U.S. 651. In *Pope* the Supreme Court, on the authority of *Jackson* and the Solicitor General's concession vacated a death sentence imposed under the Federal Bank Robbery Act, 18 U.S.C.A. 2113(e). It permits the imposition of the death penalty if the defendant in the course of the offense or subsequent flight or escape kills or kidnaps someone, but the death sentence may be imposed only if a jury directs it. The *Jackson* defect was introduced into the statute as originally enacted. There was no prior history of the statute free of the *Jackson* infirmity. In the context of our problem, therefore, *Pope* is neutral. It does not militate against invalidation of an ameliorating amendment which introduced the *Jackson* defect rather than invalidation of portions of an earlier statutory scheme which contained no *Jackson* defect. If, therefore, *Jackson* requires invalidation of North Carolina's present statutory scheme of imposing punishment for murder in the first degree, we have no present warrant for assuming that it invalidates anything other than the amendment which introduced the defect into the scheme, just as *Jackson* held.

5. *Quare* whether Patton v. North Carolina, 4 Cir., 381 F.2d 636, applies in this kind of a situation to foreclose putting the defendant, who seeks a retrial, to the choice he contends he should have had in the first instance.

The constitutional provisions and statutes of the State of North Carolina declared unconstitutional by the Fourth Circuit Court of Appeals which are involved are:

North Carolina Constitution, Article I. Sec. 13:

"No person shall be convicted of any crime but by the unanimous verdict of good and lawful persons in open court . . . "

North Carolina General Statute 15-162.1. Plea of guilty of first degree murder, first degree burglary, arson or rape:

(b) In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of a crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison.

North Carolina General Statute 14-17. Murder in the first and second degree defined; punishment:

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two (2) nor more than thirty (30) years in the State's prison.

North Carolina General Statute 14-21. Punishment for rape:

Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in State's prison, and the court shall so instruct the jury.

North Carolina General Statute 14-52. Punishment for burglary:

Any person convicted, according to due course of law, of the crime of burglary in the first degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

North Carolina General Statute 14-58. Punishment for arson:

Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in State's prison, and the court shall so instruct the jury.

Supreme Court of the United States

No. 1064 -----, *October Term, 19* 68

North Carolina,

Appellant,

v.

Henry C. Alford

APPEAL from the United States Court of Appeals for the Fourth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

April 7, 1969

Supreme Court of the United States

No. 1064 ---, *October Term, 19* 68

North Carolina,

Appellant,

v.

Henry C. Alford

UPON CONSIDERATION of the motion of appellee for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 7, 1969

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Supreme Court of the United States

October Term, 1968

No.

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit on November 26, 1968, decided and filed its written opinion, which is not yet reported. A copy of the opinion is attached to this jurisdictional statement as Appendix A.

JURISDICTION

The appeal herein is from a final judgment decided and filed by the United States Court of Appeals for the Fourth Circuit on November 26, 1968, which held that "in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional,

and hence capital punishment may *not*, under JACKSON, be imposed under any circumstances." The court further held invalid all capital convictions pursuant to the various North Carolina statutes, and cast doubt upon the validity of all guilty pleas to capital offenses which impose mandatory life sentences under the appropriate North Carolina statutes, together with casting doubt upon the validity of all convictions upon pleas to the various lesser included offenses when a defendant has been indicted for a capital offense.

The Supreme Court of the United States has jurisdiction to review by direct appeal the opinion complained of by the provisions of 28 U.S.C. Sec. 1254(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the opinion on direct appeal in this case. UNITED GAS PIPE LINE COMPANY v. IDEAL CEMENT COMPANY, 369 U.S. 134 (1961); WATSON v. EMPLOYERS LIABILITY ASSUR. CORP., 348 U.S. 66 (1954), rehearing denied, 348 U.S. 921 (1954).

The constitutional provisions and statutes of the State of North Carolina declared unconstitutional by the Fourth Circuit Court of Appeals which are involved are:

North Carolina Constitution, Article I. Sec. 13:

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North Carolina General Statute 14-58. Punishment for arson:

Any person convicted according to due course of law of the crime of arson shall suffer death: Provided, if the jury shall so recommend, at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in State's prison, and the court shall so instruct the jury.

The United States Court of Appeals for the Fourth Circuit held that the statutory scheme presented by these statutes for the imposition of the death penalty is unconstitutional, under the decision of this court in UNITED STATES v. JACKSON, 390 U.S. 570 (1968) and concluded that capital punishment may not, under JACKSON, be imposed under any circumstances; held unconstitutional all capital convictions and cast doubt upon the constitutional validity of all guilty pleas entered pusuant to N.C.G.S. 15-162.1 (plea of guilty of first degree murder, first degree burglary, arson or rape, supra), to capital charges, and cast doubt upon the constitutional validity of all convictions upon pleas of guilty to lesser included offenses when the defendant was indicted on a capital charge.

QUESTIONS PRESENTED

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED:

I. IN HOLDING AND CONCLUDING THAT IN THE PRESENT POSTURE OF THE NORTH CAROLINA STATUTES THE VARIOUS PROVISIONS FOR THE IMPOSITION OF A DEATH PENALTY ARE UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

II. IN HOLDING AND CONCLUDING THAT IN THE PRESENT POSTURE OF THE NORTH CAROLINA STATUTES THAT CAPITAL PUNISHMENT MAY NOT BE IMPOSED UNDER ANY CIRCUMSTAN-

CES BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

III. IN HOLDING AND CONCLUDING THAT ALL NORTH CAROLINA CAPITAL CONVICTIONS ARE INVALID BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968).

IV. IN HOLDING AND CONCLUDING THAT THE JACKSON DECISION RETROACTIVELY APPLIES TO ALL CAPITAL INDICTMENTS WHEN THE DEFENDANT PLEADED GUILTY AND WAS SENTENCED TO LIFE IMPRISONMENT.

V. IN HOLDING AND CONCLUDING THAT THE JACKSON DECISION APPLIES TO INCLUDE PLEAS TO LESSER INCLUDED OFFENSES, WHERE THE DEFENDANT WAS ORIGINALLY INDICTED FOR A CAPITAL OFFENSE.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

N.C.G.S. 15-162.1 (Plea of guilty of first degree murder, first degree burglary, arson or rape);

N.C.G.S. 14-17 (Murder in the first and second degree defined);

N.C.G.S. 14-21 (Punishment for rape);

N.C.G.S. 14-52 (Punishment for burglary);

N.C.G.S. 14-58 (Punishment for arson); and

N.C.Const., Art. I, Sec. 13, all as previously set out under the heading "JURISDICTION."

STATEMENT OF THE CASE

At the December 2, 1963 Term of the Superior Court of Forsyth County, North Carolina, Henry C. Alford was indicted for the Murder in the First Degree of Nathaniel Young, and

Fred G. Crumpler, Esq., of the Winston-Salem, North Carolina, bar was appointed as his counsel.

Counsel thoroughly investigated the case, including the questioning of the investigating officers and all witnesses for the State. Counsel also contacted all witnesses named to him by the defendant, except for a person named as "Jap" who could not be located. Counsel found that none of the witnesses would be helpful to Alford, but that all of their testimony was detrimental and concluded that the State's case against the defendant was overwhelming.

Counsel discussed this matter with the defendant on several occasions, advised him of the testimony of the witnesses against him, and also advised him of the possible jury verdicts. Alford, after discussing the situation with counsel and his sister, who had been contacted by counsel, decided to enter a plea of guilty to second degree murder and signed a statement, read to him by Mr. R. B. Haskins, a Deputy Clerk of the Superior Court of Forsyth County, authorizing the entry of the plea of guilty to second degree murder.

On December 10, 1963, Alford, through counsel, entered a plea of guilty to second degree murder. Subsequent to the presentation of witnesses, the defendant took the stand. Alford admitted that he had been advised of his rights and he had authorized the entry of the guilty plea. He repeatedly admitted the entry of the plea, the weight of the evidence against him, and his continuing desire to enter the plea of guilty to second degree murder, although he did qualify his statement with a continuing denial of guilt. Alford also admitted to a homocide conviction in Virginia; nine convictions of armed robbery, and a lengthy list of other convictions. Before the guilty plea was accepted, there was an informal statement of the State's evidence, including declarations by defendant a few moments before the homocide of his purpose to kill the victim and admissions, shortly thereafter, that the defendant had done it. Thereupon, the plea of guilty to second degree

murder was accepted and Alford was sentenced to a term of thirty (30) years. He did not appeal.

Subsequently, Alford applied for a Writ of Certiorari to the Supreme Court of North Carolina, but the writ was denied on March 24, 1964, and the case remanded for a post-conviction hearing in the Superior Court of Forsyth County. At the December 7, 1964 Term of the Superior Court of Forsyth County, Alford was given a plenary hearing before Judge Frank M. Armstrong. On March 19, 1965, Judge Armstrong entered an Order containing findings of fact and conclusions of law denying the relief sought by Alford. Alford then requested a Writ of Mandamus from the Superior Court of Forsyth County and this was denied on April 14, 1965. He then applied for another post-conviction hearing and this was denied on May 3, 1965. Alford did not apply for a Writ of Certiorari to the Supreme Court of North Carolina to review the decision of Judge Frank M. Armstrong.

Alford filed his first application for Writ of Habeas Corpus with the United States District Court for the Middle District of North Carolina on June 16, 1965. On June 18, 1965 the Court entered an Order dismissing the application as petitioner was not within the jurisdiction of the Middle District Court. Alford was subsequently transferred within the jurisdiction of the Middle District Court of North Carolina and so advised the Court. The Court thereupon entered an Order considering the paper-writing as a motion to reconsider the petition which the Court granted. The Court had the benefit of the transcript of the State Post-conviction hearing and adopted the findings of fact of the State Court. In a lengthy opinion, Judge Gordon found petitioner's plea to be voluntary and denied the relief sought. (Memorandum and Order, Case No. C-112-G-65, Appellant's Appendix B)

Forty-eight days after the District Court's Order denying the Writ, Alford filed a Notice of Appeal. The District Court considered the Notice as a "Motion in the Cause to Allow an Appeal and a Motion for New Hearing." Both were denied

and from that denial Alford appealed. The Court of Appeals for the Fourth Circuit in Memorandum Decision No. 10,391 affirmed the denial. (Appellant's Appendix C)

On December 8, 1965, a petition for Writ of Habeas Corpus was filed directly in the United States Court of Appeals for the Fourth Circuit. In a Memorandum dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. (Memorandum Decision No. 220, Appellant's Appendix D)

Alford filed still another petition for Writ of Habeas Corpus in the United States District Court for the Middle District of North Carolina. The Honorable Eugene A. Gordon again considered Alford's various contentions and once more concluded that none of his constitutional rights had been violated and denied the petition. (Memorandum Opinion and Order, Case No. C-98-G-67, Appellant's Appendix E.).

Alford then appealed to the United States Court of Appeals for the Fourth Circuit to review the summary denial by the Honorable Eugene A. Gordon in Memorandum Opinion and Order No. C-98-G-67, filed June 5, 1967, and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of UNITED STATES v. JACKSON, 390 U.S. 570 (1968), enunciated subsequent to the judgment of the District Court, that the judgment appealed from should be reversed and in so doing held not only "that in the present posture of the North Carolina statutes the various provisions for the impositions of the death penalty are unconstitutional, and hence capital punishment may *not*, under JACKSON, be imposed under any circumstances," but went beyond the holding in UNITED STATES v. JACKSON, *supra*, in holding that JACKSON is applicable when the defendant pleaded guilty to a lesser included offense punishable only by term of years and not by death.

THE QUESTIONS SUBMITTED ARE SUBSTANTIAL

The Fourth Circuit Court of Appeals has held unconstitutional the entire statutory scheme for the imposition of the

death penalty for the crimes of rape, murder, burglary and arson, of the State of North Carolina, together with declaring unconstitutional the statute (N.C.G.S. 15-162.1) permitting a capital defendant to plead guilty and receive a mandatory life sentence. The Court of Appeals also held invalid all capital convictions in which the capital defendant was convicted of a capital crime and the jury did not recommend mercy. Additionally, the Court of Appeals held that all capital convictions upon a plea of guilty, with the imposition of a mandatory life sentence, may be invalid, in a case by case review, and convictions upon pleas of guilty to lesser included offenses, where the defendant was originally indicted for a capital charge, may also be invalid, in a case by case review.

The law enforcement officials of the Federal Government and of all fifty states have heretofore proceeded on the premise that the Constitution did not prohibit a statutory scheme such as that enacted in North Carolina. The constitutionality of a "not guilty" plea to a capital charge and the constitutional validity of a "guilty" plea to a capital charge with the imposition of a mandatory life sentence were never in doubt until this Court decided UNITED STATES v. JACKSON, 390 U.S. 570 (1968). The impact of the JACKSON decision, as erroneously expanded in ALFORD, could overshadow the landmark decision in GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963) inasmuch as JACKSON-ALFORD are exclusively involved with defendants originally indicted for capital offenses and who usually, even before GIDEON, had court-appointed counsel. If ALFORD is to stand, it would involve the retrial of all defendants who have heretofore, at any time in the past, been convicted upon their pleas of guilty to indictments charging the capital crimes of rape, murder, burglary and arson, the four felonies declared to be capital in the State of North Carolina.

Statistics developed by the North Carolina Department of Correction indicate that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files produced the finding that 68.8%

of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. This, of course, does not include all those inmates who entered pleas to lesser included offenses, when charged with a capital offense, and to develop any statistics in this regard would require a file by file review of all inmates in the custody of the Department of Correction. The number, unquestionably, would be substantial.

The issues presented in this appeal are applicable far beyond the State of North Carolina. The procedures of the State of New Jersey were also declared unconstitutional by the Fourth Circuit in ALFORD (N.J.S.A. 2A:113-3, 4). Among the several states, other than North Carolina and New Jersey, in which a capital defendant may plead guilty and avoid the death penalty, are Louisiana (La. Code of Crim. Procedures, Art. 557); New York (N.Y. Code of Cr. Proc. Sec. 332.1); South Carolina (S.C. Code, Sec. 17-553.4); New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5); Washington (Rev. Code of Wash., Title 9, Sec. 9.52.010) (Kidnaping); and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Article 1.14). This list, which is not intended to be complete, illustrates the extent of the impact of JACKSON-ALFORD and the need for this Court to clarify the import of JACKSON upon the states.

As stated by this Court in STOVALL v. DENNO, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 St. Ct. 1967 (1967).

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards."

The ruling in JACKSON, as extended by ALFORD, was not foreshadowed in any case. No court announced such a requirement until the Fourth Circuit extended the holding in ALFORD. It is crystal clear that retroactive application of JACKSON and ALFORD would seriously disrupt the admin-

istration of our criminal laws. To void the conviction of every defendant indicted for a capital offense who pled guilty to the offense or to a lesser offense is so devastating that this court should need no further elaboration.

Although the State of North Carolina is appealing from the holding of the Fourth Circuit in its application of JACKSON, we emphasize yet another defect in ALFORD by quoting at length from Chief Judge Haynsworth's dissent:

> "I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum statutory punishment for which is imprisonment for not more than thirty years . . . .
>
> "The plea of guilty to murder in the second degree, however, was not the product of a constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sesntence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degree would not have differed in the slightest from the pressure he actually experienced.
>
> " . . . If he (Alford) is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute

which bears no causal relationship to the entry of the plea which the majority strikes.

"Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of the more likely sentence of life imprisonment than the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

"Such plea bargaining, when the defendant is properly represented, is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

"There is nothing in JACKSON which intimates disapproval of that kind of plea bargaining. Its absence, or the absence of agreement, is the thing that produced the JACKSON dilemma. Yet, that is all that happened here. Alford successfuly bargained for a plea to a lesser included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the

statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In JACKSON the statutory defect created the issue, here it has no causal connection with it." (Appendix A at p. 32)

The opinion of this Court in JACKSON did not discuss its applicabilitay to convictions upon pleas of guilty entered before JACKSON was rendered, nor did it discuss pleas to lesser included offenses, the historical area of "plea bargaining."

In JACKSON this Court reinstated the indictment and held that the defendant could plead to the indictment free of the burden imposed by the death penalty. In POPE v. UNITED STATES, 392 U.S. 651 (1968) this Court held that Pope's death sentence be vacated and the cause remanded for resentencing. Nowhere has this Court suggested a holding as sweeping in its total scope as the Fourth Circuit's holding in this case.

CONCLUSION

It is submitted that the decision of the Fourth Circuit in the application of the JACKSON doctrine in this case extends well beyond the intent of this Court—(1) in holding JACKSON to be applicable to North Carolina and declaring unconstitutional our entire scheme for capital punishment; (2) in holding that all capital convictions are invalid; (3) in holding that the ameliorating provisions of our statutes introduced unconstitutional burdens; (4) in holding that JACKSON applies to pleas of guilty to capital offenses requiring mandatory life sentences; (5) in holding that JACKSON applies to pleas to lesser included offenses; and, (6) in holding that this all applies retroactively. Any one, much less in combination, presents questions of immediate, vital importance, not only to North Carolina, but also to the Federal Courts and to many of our sister states. We believe that the questions submitted are truly substantial and present to this Court far reaching issues of the most vital public importance that must be answered.

Respectfully submitted,

ROBERT MORGAN
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Jacob L. Safron
Staff Attorney

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,598

Henry C. Alford,
Appellant,

versus

State of North Carolina,
Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.
Eugene A. Gordon, District Judge.

(Argued June 18, 1968. Decided November 26 1968.)

Before HAYNSWORTH, Chief Judge, and BRYAN and WINTER, Circuit Judges

Doris R Bray (Court-assigned counsel) [Smith, Moore, Smith, Schell & Hunter on brief] for Appellant, and Jacob L Safron, Staff Attorney, Office of the Attorney General of North Carolina (T. W Bruton, Attorney General of North Carolina, on brief) for Appellee.

WINTER, Circuit Judge:

Petitioner seeks review of the summary denial of his petition for a writ of habeas corpus. Because we conclude that, under the guiding principles of *United States v. Jackson*, 390 U. S. 570 (1968),[1] enunciated subsequent to the judgment of the district court, petitioner's plea of guilty to the crime of second degree murder was demonstrably coerced, the judgment appealed from will be reversed and the district court directed to issue the writ, staying its effect for a reasonable period to enable North Carolina to retry petitioner if it be so advised.

Petitioner was indicted by a grand jury of the State of North Carolina for murder in the first degree. With the approval of the state, he pleaded guilty to murder in the second degree and was sentenced on December 10, 1963, to a term of thirty years.

In due course, he sought and was granted a post-conviction hearing, pursuant to N. C. Gen. Stat. §§ 15-217 – 15-222 (1965). The state judge who conducted the hearing rejected petitioner's

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1. See also, *Pope v. United States*, 392 U.S. 651 (1968) (per curiam), which applied the principle of *Jackson* to the death penalty provisions of the Federal Bank Robbery Act, 18 U.S.C. § 2113 (e) (1964). We note that the Court in *Pope* invalidated the capital punishment provision with no discussion of any peculiarities in the legislative history of the Bank Robbery Act such as those which occupied the Court in *Jackson* in relation to the Federal Kidnaping Act. Indeed, the legislative history of the Bank Robbery Act shows that *as originally enacted* imprisonment and capital punishment were alternative punishments, and that these alternatives were unaccompanied by a severability clause. 48 Stat. 783. Thus, *Pope* has precedential value in determining how statutes should be brought into conformity with *Jackson*, as a matter of statutory construction.

various constitutional contentions, including the claim that his guilty plea had been involuntarily induced. After the unsuccessful pursuit of various state remedies, petitioner sought a writ of habeas corpus from the district court. On September 3, 1965, the district judge denied the relief sought, expressly adopting the facts concerning the voluntariness of petitioner's plea as previously found by the state judge in the post-conviction proceedings. After the time for appeal to this Court had expired, petitioner filed with the district court a purported notice of appeal, which was treated by the district court as a motion for a certificate of probable cause and a motion for a new hearing. Both motions were denied, and we dismissed petitioner's appeal on the ground that it had not been perfected within the prescribed thirty-day time limit. *Alford v North Carolina*, No. 10,391 (4 Cir. August 25, 1966) (Mem.).

Concurrently, a petition for a writ of habeas corpus was filed in this Court and was denied by Chief Judge Haynsworth, who also rejected petitioner's various constitutional contentions.[2] Again, in 1967, petitioner sought a writ of habeas corpus from the district court and, again, relief was denied

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2 It should be noted, however, that the record before Chief Judge Haynsworth apparently did not contain a transcript of petitioner's trial. See, *Alford v. North Carolina*, Misc. No. 220 (4 Cir. August 3, 1966) (Mem.) As we shall see, the trial transcript casts significant light upon the question of the voluntariness of petitioner's plea. Additionally, Chief Judge Haynsworth's disposition of the petition preceded the decision in *United States v Jackson*, 390 U. S. 570 (1968)

In acting upon the 1967 petition, the district judge apparently considered that inquiry into the voluntariness of petitioner's guilty plea was foreclosed by the prior consideration of this question by the district court and by Chief Judge Haynsworth. The district judge, therefore, dealt primarily with, and rejected, petitioner's contention that he had been deprived of the effective assistance of counsel.[3]

- I -

The State of North Carolina argues that petitioner has not presented either to this Court or to the district court any new factual allegations which should disturb the prior and unanimous findings of fact concerning the voluntariness of the plea of guilt. The rule of the federal courts, expressed in 28 U.S.C. § 2244 (1967 Supp.),[4] is not to entertain successive and repetitive

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3 In view of our disposition of this appeal, we need consider neither this contention nor petitioner's other constitutional challenges urged upon the district court, which were an alleged unlawful search of petitioner's home and an alleged denial of the right to counsel at an interrogation. We deal only with the question of voluntariness of petitioner's guilty plea.

4. 28 U.S.C. (1967 Supp.):

" § 2244. Finality of determination

* * * * *

(b) When after an evidentiary hearing on the merits or a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such a person need not be entertained by a court of the United States or a justice or judge of the United States *unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ*, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." (emphasis added)

habeas corpus petitions if the grounds asserted to support the petition have been previously decided on the merits, and the ends of justice would not be advanced by plenary consideration of the subsequent application. See, *Sanders v United States*, 373 U. S. 1, 11, 15-19 (1963). We do not depart from this doctrine. However, the instant appeal deals primarily not with new factual allegations but, rather, with what is admittedly a new question of law, namely, the applicability and effect of the Supreme Court's recent decision in the *Jackson* case. To the extent that the appeal raises this question of law, what was said in *Sanders* is significant:

> "Even if the same ground was rejected on the merits on a prior application, it is open to the applicant to to show that the ends of justice would be served by permitting the redetermination of the ground * * * If purely legal questions are involved, the applicant may be entitled to a new hearing *upon showing an intervening change in the law* or some other justification for having failed to raise a crucial point or argument in the prior application. * * * the foregoing enumeration is not intended to be exhaustive; the test is 'the ends of justice' and it cannot be too finely particularized." 373 U. S., at 16-17. (emphasis added.)[5]

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5. While *Sanders* spoke of proceedings under 28 U.S.C. § 2255, the present federal substitute for habeas corpus, the considerations it discussed are no less applicable to habeas corpus by a prisoner incarcerated under state process.

To the extent that proper disposition of the instant appeal depends upon factual considerations, this is the first time that the transcript of petitioner's original trial and of his state post-conviction proceedings have both been before the full court. Res judicata has no place in habeas corpus proceedings. *Fay v. Noia*, 372 U. S. 391 (1963); *Sanders v. United States, supra*. Especially is this so when there is reason to reappraise the facts because of the introduction of a new pertinent rule of law. Thus, we conclude that we are not precluded from a reconsideration of petitioner's constitutional argument based upon the *Jackson* case, or his factual argument based upon a consideration of the entire record of the proceedings, alone, or in the light of *Jackson*.

– II –

There can be little question but that petitioner tendered his plea of guilty at a time that he was the subject of impermissible burdens condemned in the *Jackson* case. *Jackson* held invalid the death penalty provision of the Federal Kidnaping Act,[6] on the basis that it had a chilling effect upon the Sixth Amendment right to a jury trial, and the Fifth Amendment right "not to plead guilty," i. e., the privilege against self-incrimination. Of course, *Jackson* was a case which arose under the Fifth and Sixth Amendments

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6. 18 U.S.C. (1964 Ed.)
" § 1201. Transportation

(a) Whosoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) *by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend,* or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (emphasis added.)

as such, while the instant case, a state prosecution, concerns the Fourteenth Amendment; but the test of what violates the Fourteenth Amendment in this area is the same.[7]

The federal statute in *Jackson* essentially created the special offense of "kidnaping where the victim has not been liberated unharmed" punishable by imprisonment for a term of years or for life or by death, upon the discretionary, yet binding, recommendation of the jury. Where a victim has not been liberated unharmed, only an accused *who exercised his right to a jury determination of guilt or innocence* faced the prospect of the possible imposition of the death penalty. This prospect was sufficient, in the view of the Court, to render the death penalty provision unconstitutional on the two separate grounds: (1) the fact that the jury alone could impose the death penalty tended to deter the exercise of the right to a jury trial guaranteed by the Sixth Amendment, and (2) the statutory scheme tended to encourage pleas of guilty or, stated otherwise, to discourage assertion of the Fifth Amendment right not to plead guilty.

North Carolina law presently prescribes the death penalty for murder in the first degree,[8] as well as certain other

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7. The Sixth Amendment right of trial by jury is made applicable to the states by the Fourteenth Amendment. *Parker v. Gladden*, 385 U. S. 363 (1966); *Duncan v. Louisiana*, 391 U. S. 145 (1968). The Fourteenth Amendment outlaws coerced guilty pleas in state prosecutions. See, e. g., *Herman v. Claudy*, 350 U. S. 116 (1956). A coerced guilty plea is, of course, an infringement upon the right not to plead guilty, i. e., the privilege against self-incrimination.

8. N.C.Gen.Stat. §14-17 (1953):

"Murder in the first and second degree defined; punishment. – A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and *shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison,* and the court shall so instruct the jury. All other kinds of murder shall be deemed

crimes.[9] In each instance the penalty prescribed is death; in each instance also the jury may, in its discretion, obligatorily recommend that punishment be imprisonment for life. North Carolina does not permit an accused who pleads not guilty to waive a jury trial.[10] The accused may avoid a jury trial only if he pleads guilty and, by statute, a plea of guilty may not result in a punishment more severe than life imprisonment.[11] Thus, a person accused of a capital crime in North Carolina is faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment. It was precisely this sort of inhibitory or chilling effect upon the exercise of constitutional

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FOOTNOTE 8 (Continued from page 7)

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." (emphasis added.)

9. N.C.Gen.Stat. § 14-21 (1953) (forcible rape of female of age twelve years or more or carnal knowledge of female under twelve); N.C.Gen.Stat. § 14-52 (1953) (burglary in the first degree); N.C.Gen.Stat. § 14-58 (1953) (arson).

10. "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful persons in open court * * *." N.C. Const., Art. I, § 13. This right cannot be waived. *State v. Muse*, 219 N.C. 226, 13 S.E.2d 229 (1941); *State v. Hill*, 209 N.C. 53, 182 S.E. 716 (1935).

11. An accused who pleads guilty to one of the four capital crimes is to be sentenced to life imprisonment. N.C.Gen.Stat. § 15-162.1(a), (b) (1965). In the instant case, petitioner was allowed to plead guilty to murder in the second degree with the concurrence of the state and the trial court. The maximum penalty for this offense, to which appellant was sentenced, is thirty years. N.C.Gen.Stat. § 14-17 (1953).

rights which the Supreme Court condemned in *Jackson*, because a statutory scheme such as that employed by North Carolina "needlessly encourages" guilty pleas and jury waivers [12]

North Carolina seeks to distinguish the instant case from *Jackson* on the ground that under the Federal Kidnaping Act the jury possessed the authority to *increase* the punishment to be imposed upon the defendant beyond that which the court could impose; while under North Carolina law the statutorily-prescribed penalty for murder in the first degree and certain other crimes is death and the jury is merely given the power to *mitigate* the harshness of the maximum penalty. We are not persuaded that the difference amounts to a distinction. Under both statutes it is the jury which determines guilt, and that jury alone which, in its discretion, decides if the death penalty is to be exacted. As to imposition or non-imposition of the death penalty the jury's determination is exclusive, conclusive and final. Of greater significance, in *Jackson* the argument was advanced that the Federal Kidnaping Act's penalty provisions operated to "mitigate the severity of punishment" and that it was, therefore, immaterial that the Act "may have the incidental effect of inducing defendants not to contest in full measure" their culpability. The Court explicitly rejected this contention, stating that the consequent chilling effect upon the exercise of constitutional rights was "unnecessary and therefore excessive." 390 U. S. 570, at 582. *Jackson* thus renders unavailing North Carolina's argument.

12. Indeed, it is arguable that the North Carolina statutory scheme is more objectionable than the former Federal Kidnaping Act. Under the federal statute, the accused had three choices: he could plead guilty, not guilty and accept a jury trial, or not guilty and, with the consent of the prosecutor and the court, waive a jury trial. Thus, an accused could simultaneously avoid the death penalty and assert his innocence in a guilt-determining proceeding, namely, a bench trial. The accused in North Carolina has no such option; *if he asserts his innocence at all*, he risks capital punishment. Therefore, unlike the federal scheme, *every* defendant in a North Carolina capital case is, in the phraseology of *Jackson*, "needlessly *encourage* [d]" to forego his rights to a jury trial and not to plead guilty.

Nor do we find persuasive North Carolina's further argument that in *Jackson* the Court did not question the constitutionality of the death penalty *per se*. Undoubtedly this is true, but the Court in *Jackson* was careful to state that whatever the power to impose a death penalty "Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right." 390 U. S. 570, at 583. The clear import of *Jackson* is that if North Carolina wishes to retain the death penalty it must do so by means different from those presently enacted. That there are other means is self-evident. See, e. g., *United States v. Jackson*, 390 U. S., at 582-83.

We are thus constrained to disagree with the dictum of the Supreme Court of North Carolina in *State v. Peele*, 274 N. C. 106, 161 S.E.2d 568 (1968), that there are "certain material differences" between the Federal Kidnaping Act and the North Carolina statutes,[13] so that "Jackson is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances." (161 S.E.2d, at 572). To the contrary, we conclude that in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional, and hence capital punishment may *not*, under *Jackson*, be imposed under any circumstances.[14]

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13. But see, *Laboy v. State of New Jersey*, 266 F. S. 581 (D. N.J. 1967), which reached an opposite conclusion with respect to the New Jersey statutes which in turn are like the North Carolina statutes.

14. As Chief Judge Haynsworth notes in dissent, South Carolina has sought to avoid the *Jackson* problem by holding in *State v. Harper*, ____ S. C. ____, 162 S.E.2d 712 (1968), that the South Carolina statute, which makes a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy (§ 17-553.4, 1967 Supp. to 1962 Code of Laws), is invalid and by requiring the submission of the issue of punishment to the jury in every case. We express no view whether the laws of South Carolina, as so construed, comport with *Jackson*. We note in passing that the purported solution to the *Jackson* problem arrived at by the South Carolina court runs directly counter to the current national trend which has produced a marked curtailment in the employment of the death penalty device. However, it is enough for the purposes of this

Since the argument in this case, the Supreme Court of New Jersey has decided *State v. Forcella*, 52 N. J. 263, 245 A.2d 181 (1968). Because of the similarity between the North Carolina and New Jersey statutes, the case is of significance to us. Under New Jersey law an individual accused of murder has essentially two choices: (1) he may assert his innocence by demanding a trial by jury, in which case, if convicted, he may be sentenced to death, or (2) he may enter a plea non vult, or nolo contendere, which, if accepted, carries a maximum penalty of life imprisonment. In *Forcella* this statutory scheme was assailed under *Jackson*.

By a split decision the New Jersey Court held the *Jackson* rationale not controlling. This result was influenced by several considerations, but the real basis of decision was, we believe, an erroneous reading of *Jackson*. The majority pointed out that under New Jersey law only a jury could determine guilt or innocence if that issue were contested. Coupled with this fact, the majority read *Jackson* to render the Sixth Amendment right applicable only when there are two alternative guilt-determining processes and the jury trial alternative produces greater risks for the accused, and, further, to hold that both the Fifth and Sixth Amendment rights must be violated before the statutory scheme would become vulnerable to constitutional attack.

We do not find this reading persuasive. Under a strict *Jackson*–type statute, such as the Federal Kidnaping Act, an accused who pleads not guilty and seeks a bench trial waives *only* his right to a jury trial. An accused who pleads guilty (or non vult) in either the *Jackson* or *Forcella* situations simultaneously foregoes *both* his right to a jury trial and his right not to plead guilty.

FOOTNOTE 14 (Continued from page 10)

case that North Carolina has not amended its statutes, nor has its Supreme Court undertaken to limit them in the light of *Jackson*.

Jackson arose in the context of a challenge to the indictment before the defendant entered any plea. Since Jackson had thus given no indication that he might ultimately wish to waive his right to a jury trial or his right to assert his innocence, the Court had before it the effect of the federal act on both of Jackson's rights. We think it incorrect to say that they were "intertwined" so that the majority in *Jackson* did not "say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment." *State v Forcella,* 245 A.2d 185-186.

Like the dissenters in *Forcella,* we read *Jackson* to treat the Fifth and Sixth Amendments to be independent constitutional underpinnings for the result. It follows, therefore, that the New Jersey statutory scheme, like that of North Carolina, is more conspicuously invalid than the federal statute in *Jackson,* because under the federal statute an accused could assert his innocence and avoid a death sentence by a bench trial, while in New Jersey avoidance of a death sentence may be accomplished only by waiver of the right to plead not guilty *and* by waiver of the right to a jury trial. *Jackson* condemned the needless encouragement of guilty pleas and waiver of jury trails Greater encouragement is inevitable in a New Jersey-type statute than in the federal statutes held invalid, in part, in *Jackson* and *Pope.* Thus, we decline to follow *Forcella*

Jackson arose by a motion to quash an indictment grounded on the Federal Kidnaping Act. The case at bar arises, *inter alia,* from an attack upon the voluntariness of a plea of guilty While *Jackson* clearly stands for the proposition that the death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty, it falls short of holding

that the North Carolina statutory provisions for the imposition of capital punishment are in themselves inherently coercive.[15] In *Jackson* the Court stated that the mere fact that an accused had pleaded guilty to a charge under the Federal Kidnaping Act did not necessarily render his plea involuntary and require reversal of his conviction.[16]

By a parity of reasoning, we think that a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law. *Jackson* by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens – specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. *Jackson* thus defined a new factor to be given weight in determining the voluntariness of a plea – a factor present in full measure in the instant case because of the

15. "* * * the evil in the * * * statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right." 390 U. S., at 583. (emphasis in original.) See also, *Gilmore v. California*, 364 F.2d 916, 918 (9 Cir. 1966); *LaBoy v. New Jersey*, 266 F. S. 581, 584-85 (D. N.J. 1967).

16. See, 390 U. S., at 583 & n. 25. The Court also referred to its opinion in *Griffin v. California*, 380 U. S. 609 (1965), which held that a defendant's failure to testify could not be commented upon by the prosecution or the trial court. The Court noted that it "obviously does not follow that every defendant who ever testified at a pre-*Griffin* trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled." *Id.*, at 583, n. 25.

North Carolina statutory scheme.[17] As we read *Jackson*, we must determine the extent to which, if at all, petitioner was moved to plead guilty because of the incentive which the North Carolina statutory scheme supplied to achieve that result.[18]

– III –

In the light of the principles we distill from *Jackson*, we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was made involuntarily, and that petitioner is entitled to relief by habeas corpus.[19]

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17. It is immaterial in our view that petitioner pleaded guilty to murder in the second degree rather than to murder in the first degree under which he was charged. For all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder. Of course, if the state had determined that it would only prosecute for second degree murder, *and this fact had been known to the petitioner before his plea was entered*, then it could hardly be maintained that his guilty plea was a product of a fear of the death penalty.

    To us the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense. This is not to say, however, that where, as here, the plea is accepted to a lesser included offense, there is not a higher burden of proof upon one attacking the judgment entered thereon to show that the plea was the result of an invidious consideration than if the plea were to the degree of the crime which would support capital punishment. The very process of downgrading the charge may well suggest that the plea was motivated by factors other than a fear of death; certainly, it is circumstantial evidence that punishment by death was not a substantial possibility in view of the prosecutor's acquiescence in significant concessions. From a strictly evidentiary standpoint, we think this case is not the ordinary one and petitioner has met the burden of proof placed on him.

18. To the extent that *Gilmore v. California*, 364 F.2d 916 (9 Cir. 1966), cited to us by North Carolina, may be read as holding that a statutorily supplied incentive to plead guilty so as to avoid the death penalty may not as a matter of law render the plea involuntary, we think that its holding has been undermined by *Jackson*.

19. The dissent argues that we perform a futile act in granting post-conviction relief because, if it is assumed that North Carolina corrects the *Jackson* defect in its statutory scheme, petitioner "if he is well advised" will merely plead guilty once again to second degree murder. Of course, North Carolina may, at some future time, enact a capital punishment statute which is not constitutionally infirm under *Jackson*. However, we do not agree with the implied premise of the dissenting opinion that petitioner

The record is uncontradicted that from the time that petitioner entered his plea he professed his innocence of any homicide. No court has ever found that he pleaded guilty other than to avoid possible imposition of the death penalty.[20] During the course of his first appearance before the court, petitioner stated:

> "* * * I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and *I just pleaded guilty bacause they said if I didn't they would gas me for it,* and that is all." (emphasis added.)

Later, when questioned by his attorney concerning whether he still desired to plead guilty, petitioner reiterated his innocence, and gave voice to his fear of what the jury might do:

> "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

FOOTNOTE 19 (Continued from page 14).

originally pleaded guilty because of the evidence informally arrayed against him, rather than because of the threat of an unconstitutionally imposed death penalty. As the text will show, petitioner, immediately after hearing the prosecutor's claim of what it would prove, responded, "I ain't shot no man."

20. In denying petitioner's application for a writ of habeas corpus to this Court, Chief Judge Haynsworth so characterized the state post-conviction judge's findings:

"* * * there is a conflict in the testimony over why Alford actually pleaded guilty but the *state court found* that he did so because his attorney wisely advised him to plead guilty to second degree murder and *escape the possibility of capital punishment. * * * The state judge found* that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and *because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact." Alford v. North Carolina,* No. 220 (4 Cir. August 3, 1966) (Mem.). (emphasis added.)

The trial judge inquired whether petitioner still wished to plead guilty, and the question evoked the following response:

> "Yes, sir, I plead guilty on– from the circumstances that he told me "

The plain meaning of petitioner's statements at the time that he entered his plea was fully corroborated by the testimony of his trial counsel when the latter was called as a witness at the state post-conviction hearing. The attorney, Mr. Crumpler, described what had transpired as follows:

> "The understanding that I had when the trial proceeded–the Judge–Judge Johnston either asked him or I asked Judge Johnston to ask him to make sure that his plea was clear to him, and it's my memory–to the best of my memory he stated that he didn't do what he was charged of but he was going to plead guilty, or plead guilty to second degree *because he didn't want to run the risk of losing his life* I don't pretend that that is verbatim, but that is to the best of my recollection " (emphasis added)

The petitioner also testified in the state post-conviction proceedings, and his testimony then was perfectly consistent with what he had said at the time that he entered his plea:

> "Mr. Crumpler said *if I didn't enter a plea I would surely get a death sentence* That is what he told me. And my sister and a policeman, Joe McFadden, my first cousin, he was there, too And I can't read or write, and he just run over it because he knew I couldn't understand it and *he said if I didn't take a plea of second degree I would surely get a death sentence*. And my

sister said I'd better take it,[21] and he told Judge Johnston that I told him to give me thirty years, said I don't know how to try this case. Then, nobody didn't say that I done that crime, nobody in court said I did the crime." (emphasis added.)

We think that there is no question but that the incentive supplied to petitioner to plead guilty by the North Carolina statutory scheme was the primary motivating force to effect tender of the plea, especially since throughout the proceedings petitioner has protested his innocence.[22] Further evidentiary hearings are unnecessary. Under *Jackson*, therefore, the judgment entered on the plea cannot stand.

REVERSED and REMANDED

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21 Alford's sister, Mrs. Christine Greene, related her version of this encounter in an affidavit filed in the Superior Court of Forsyth County, North Carolina, dated June 19, 1965. It reads in pertinent part as follows:

"Mr. Crumpler then advised Henry that the Solicitor had intimated that he would recommend that the Court accept a plea of guilty to second degree murder and Mr. Crumpler explained that the maximum punishment for second degree murder was thirty years and that in his, Mr. Crumpler's opinion, the Court would probably sentence Henry for thirty years due to the nature of the case. Henry at first stated that he wanted to plead guilty to second degree murder; then a few minutes later, he changed his mind. I explained to Henry that if he got thirty years, I could still visit him and *it would be better than running a risk of losing his life*. Henry, at this time, was undecided and Mr. Crumpler left the cell and left us with Henry. A few minutes later, he returned and advised Henry that whatever decision he made would have to be his own decision and that no one could make the decision for him. Mr. Crumpler also advised that he could make either decision, but that we would have to reach some decision because the case was about to be called for trial. *Henry then said that he didn't kill the deceased person, but that he did not want to be killed either, and at this time stated that he wanted to enter a plea of guilty to second degree murder.*" (emphasis added.)

22 Whether petitioner is in reality guilty or innocent has not been judicially determined. In any event, petitioner has never conceded his guilt. That fact alone should have precluded plea bargaining under the rule announced in *Bailey v. MacDougall*, 392 F.2d 155, 158 n. 7 (4 Cir. 1968), "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiations must be limited to the quantum of punishment for an *admittedly* guilty defendant." (emphasis supplied.) This case is thus an inappropriate vehicle in which to discuss plea bargaining.

HAYNSWORTH, Chief Judge, dissenting:

I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum statutory punishment for which is imprisonment for not more than thirty years. In the historical context of North Carolina's statutes, this is a distinction of importance.

In *United States v. Jackson*, 390 U.S. 570, the Supreme Court held unconstitutional a statutory scheme under which capital punishment could be imposed only by a jury after a trial upon a plea of not guilty. The risk of death, which would be encountered only if the defendant pled not guilty and demanded a jury trial was held to be an impermissible burden upon the exercise of the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to a jury trial. The Supreme Court concluded that the capital punishment amendment of the "Lindbergh Act" was thus unconstitutional, but the remainder of the statute, as enacted earlier, was left intact. Dismissal of the indictment, therefore, was vacated and the case remanded, so that the prisoner would be required to exercise his choices as to his plea and to a jury trial in a context in which the risk of death would not burden one set of choices.

Here the defendant clearly stated when he tendered his plea that he was substantially motivated by the fear of execution if he entered a plea of not guilty. His contemporaneous claim of innocence may be suspect,[1] but the circumstances fully support

1. Before the guilty plea was accepted, there was an informal statement of the State's evidence, including declarations by the defendant a few moments before the homicide of his purpose to kill the victim and admissions, shortly thereafter, that he had done it. If the State's case at a trial was as strong as the statement indicated, the defendant would have little hope of acquittal.

his conscious purpose to avoid the risk of capital punishment. Under the circumstances, had the plea been to first degree murder, I would agree with the majority that the conviction should be set aside, for the victim of the very pressures *Jackson* sought to avoid ought not to be left to suffer their consequences.

The plea of guilty to murder in the second degree, however, was not the product of the constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sentence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degree would not have differed in the slightest from the pressure he actually experienced.

Alford will be subject to retrial, of course. North Carolina may remove the infirmity from its statute, so that when Alford is re-arraigned, he will be in the same position he was in initially.[2] If he is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute which bears no causal relationship to the entry of the plea which the majority strikes.

Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as

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2 I do not here consider the impact which Green v. United States, 355 U.S. 184, and Patton v. North Carolina, 4 Cir., 381 F.2d 636, might have upon retrial. See n. 4 infra.

charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of a more likely sentence of life imprisonment than of the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

Such plea-bargaining, when the defendant is properly represented is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

There is nothing in *Jackson* which intimates disapproval of that kind of plea-bargaining. Its absence, or the absence of agreement, is the thing that produced the *Jackson* dilemma. Yet, that is all that happened here. Alford successfully bargained for a plea to a lesser, included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In *Jackson* the statutory defect created the issue, here it has no causal connection with it.

There is the fact that everyone involved in the negotiation of Alford's plea reasonably believed that North Carolina's statute validly authorized a jury to impose capital punishment upon a verdict of guilty of first degree murder, while limiting the court to the imposition of a sentence of

life imprisonment upon a plea of guilty to that offense. Their misconception, revealed by *Jackson,* is relevant here, only if the effect of *Jackson* is an invalidation of the death penalty in North Carolina. We have no present basis for a conclusion that it is, as a comparative analysis of the Federal Kidnapping Act and North Carolina's murder statutes will demonstrate.

The Supreme Court in *Jackson* carefully considered the history of the Lindbergh Kidnapping Act. As originally enacted it permitted no more than life imprisonment. Later, however, it was amended to permit a jury, in its discretion, to impose capital punishment if the victim was not released unharmed. It was the amendment which created the difficutly and the pressure to forego a defendant's Fifth and Sixth Amendment rights. It was the amendment which the Court struck, for it reasonably concluded that Congress would prefer that the statute be left in its original form than for the nation to be left with no federal kidnapping statute.

The history of North Carolina's murder statutes contrasts starkly with that of the Lindbergh Act. Unitl 1949 the only penalty for first degree murder in North Carolina was death. Neither judge nor jury had any discretion about it, though juries have ways of avoiding the harsh strictures of such laws, and many a defendant whom the jury believed guilty of first degree murder must have been found guilty of a lesser, included offense. In 1949, however, N.C. Gen. Stat. § 14-17 was amended to permit the jury in its discretion to attach to its verdict of guilty a recommendation of mercy. Such a recommendation required the court to impose a sentence of life imprisonment. Four years later, in 1953, § 15-162.1(b) was enacted making a plea of guilty, when accepted by the court, the equivalent of a verdict of guilty with a recommendation of mercy and prescribing the imposition of a life sentence.

The amendments to the North Carolina statutes, like the amendment of the Lindbergh Act, introduced the *Jackson* infirmity. Though the North Carolina amendments were ameliorating, because they introduced the infirmity into

the statutory scheme, they may be rationally said to be unconstitutional, just as the amendment in *Jackson*, leaving intact North Carolina's preamendment statute.

The Supreme Court of South Carolina recently dealt with the *Jackson* problem in *State v. Harper*, S.C. , 162 S.E. 2d 712, (1968). It concluded that *Jackson* invalidated South Carolina's statute, similar to North Carolina's § 15-162.1 (b), making a plea of guilty to murder in the first degree, when accepted, the equivalent of a verdict of guilty with a recommendation of mercy. It prescribed the submission of the question of punishment to a jury in every capital case, regardless of the plea.

There is no reason to suppose that North Carolina's Supreme Court will not come to a similar resolution of the *Jackson* problem. It has indicated no antipathy toward capital punishment.[3] The death penalty has been an integral part of the laws of North Carolina relating to murder since it first became a state, and it is not suggested that is is unconstitutional *per se*. Since it was the 1949 and 1953 Acts which introduced the *Jackson* infirmity, it may be expected that the courts of North Carolina will invalidate them, or portions of them, rather than all or parts of her earlier integrated statute.

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3. The contrary is indicated by its holding that a prosecutor, by asking for life imprisonment only, may not limit the jury's discretion to impose capital punishment. State v. Denny, 249 N.C. 113; 105 S.E. 2d 446 (1958). The jury had directed life imprisonment, but on the prisoner's appeal the Court ordered a new trial at which the jury's discretion to impose capital punishment would not be limited as it had been by prosecutor and judge.

Whatever the courts of North Carolina or her legislature may do to meet the problem, we now have no right to lay the infirmity to North Carolina's hoary authorization of the death penalty rather than to the later statutes which injected into the scheme the *Jackson* deprivations of Fifth and Sixth Amendment rights. There is presently no basis for our assuming the demise of capital punishment in North Carolina. [4]

The fact of the misconception of North Carolina's lawyers and judges that her statutes validly authorized the imposition of the death penalty only by a jury would be relevant, therefore, only if the plea was to the capital offense. In such a case, had the defendant known at the time that his plea would not limit his exposure to capital punishment, he might well have chosen to plead not guilty. That misconception is wholly irrelevant, however, when the plea is to a noncapital offense. Knowledge at the time that the court might impose capital punishment upon a plea of guilty to the capital crime could have had no possible effect upon his choice to plead guilty to the lesser, noncapital offense.

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4 This conclusion is unaffected by Pope v. United States, 392 U S 651. In *Pope* the Supreme Court, on the authority of *Jackson* and the Solicitor General's concession vacated a death sentence imposed under the Federal Bank Robbery Act, 18 U S C A 2113(e). It permits the imposition of the death penalty if the defendant in the course of the offense or subsequent flight or escape kills or kidnaps someone, but the death sentence may be imposed only if a jury directs it. The *Jackson* defect was introduced into the statute as originally enacted. There was no prior history of the statute free of the *Jackson* infirmity. In the context of our problem, therefore, *Pope* is neutral. It does not militate against invalidation of an ameliorating amendment which introduced the *Jackson* defect rather than invalidation of portions of an earlier statutory scheme which contained no *Jackson* defect. If, therefore, *Jackson* requires invalidation of North Carolina's present statutory scheme of imposing punishment for murder in the first degree, we have no present warrant for assuming that it invalidates anything other than the amendment which introduced the defect into the scheme, just as *Jackson* held.

I think, therefore, that *Jackson* requires the retrial in North Carolina only of those defendants, who, for the purpose of avoiding risk of capital punishment, entered guilty pleas to the capital offense.[5]

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5 *Quare* whether Patton v. North Carolina, 4 Cir., 381 F 2d 636, applies in this kind of a situation to foreclose putting the defendant, who seeks a retrial, to the choice he contends he should have had in the first instance.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-112-G-65
STATE OF NORTH CAROLINA, Respondent	)	

MEMORANDUM OPINION AND ORDER

Petitioner, Henry C. Alford, a prisoner of the State of North Carolina, hereinafter referred to as petitioner, filed with this Court a petition for a writ of habeas corpus, and accompanied the petition with an affidavit of poverty. The petition was filed *pro se* and an order has heretofore been entered permitting the petition to be filed without the prepayment of costs or fees, or security therefor. Petitioner contends that he was denied due process of law in that his plea of guilty to a charge of second-degree murder was not voluntary; that he remained in the custody of law enforcement officers for a period of forty-two hours before a warrant was issued for his arrest; that his house was illegally searched and the alleged murder weapon was illegally seized; and that he was not allowed to have witnesses at his trial. The Court denies the relief requested by the petitioner for reasons hereinafter set forth.

Petitioner filed his first application for a writ of habeas corpus with this Court on June 16, 1965. On June 18, 1965, the Court entered an order dismissing the application as petitioner was incarcerated at Raleigh, North Carolina, which is outside the territorial jurisdiction of this Court. On June 21, 1965, the Court received a paper-writing which informed the

Court that petitioner had been transferred to Blanche, North Carolina, within the territorial jurisdiction of this Court and that he was then incarcerated there. Thereafter, on July 7, 1965, the Court entered an order stating that it considered the paper-writing a motion to reconsider the petition of the petitioner which the Court granted and further ordered the petition to be filed.

Petitioner was taken into custody by law enforcement officers in Winston-Salem, North Carolina, on November 22, 1963, and a warrant for petitioner's arrest was issued on November 23, 1963. Subsequently, at the December 2, 1963, Term of Superior Court of Forsyth County, petitioner was indicted for murder, and Fred G. Crumpler was appointed attorney for the petitioner by the Superior Court. On December 10, 1963, petitioner's case was called for trial in the Superior Court of Forsyth County, and upon a plea of guilty to second-degree murder, petitioner was sentenced to thirty years imprisonment. No appeal was taken. Subsequently, petitioner applied for a writ of certiorari from the Supreme Court of North Carolina, but the writ was denied on March 24, 1964, and the case remanded to the end that the petitioner be given a post-conviction hearing in the Superior Court of Forsyth County pursuant to North Carolina General Statutes, Chapter 15, Article 22, Section 217. At the December 7, 1964, Term of Superior Court of Forsyth County, petitioner was given a hearing before Judge Frank M. Armstrong. Thereafter, on March 19, 1965, Judge Armstrong entered an order containing Findings of Fact and Conclusions of Law denying petitioner any relief. Petitioner then requested a writ of mandamus from the Superior Court of Forsyth County, and the same was denied on April 14, 1965. Petitioner then applied for another post-conviction hearing, and this was denied on May 3, 1965.

After the post-conviction hearing at the December 7, 1964, Term of Superior Court of Forsyth County and the rendition of the order by Judge Armstrong on March 19, 1965, there is no evidence that the petitioner applied for a writ of certiorari

in order that the Supreme Court of North Carolina might review the hearing and decision. Where the avenue for review by the Supreme Court of North Carolina is still open, a failure to request such review may be fatal to the Court's jurisdiction as the petitioner would have failed to exhaust his state remedies. 28 U.S.C.A. § 2254: *Rhinehart v. North Carolina*, 4 Cir., 344 F. 2d 114 (1965). Under Chapter 15, Section 222, of the General Statutes of North Carolina, it is provided that the writ of certiorari must be applied for within sixty days after the entry of judgment. The petitioner has neglected to pursue his remedy in this respect within the time allotted and is now precluded from obtaining such writ. Therefore, it appears that the petitioner has exhausted all state remedies in that certiorari is not now available to him.

The petitioner alleged that he has been denied due process of law as guaranteed by the Constitution in that, first, in his trial in the Superior Court of Forsyth County, his plea of guilty was not voluntary, but was coerced by his court-appointed attorney, Fred G. Crumpler, and the Clerk of the Superior Court; second, that he remained in custody of law enforcement officers for a period of forty-two hours before a warrant for his arrest was issued; third, that his house was illegally searched and the alleged murder weapon was illegally seized; and fourth, that he was not allowed to have witnesses at his trial.

The Court is of the opinion that if the petitioner's plea of guilty is found to be voluntary, then his other three contentions are not sufficient to merit him relief. Entry of a valid plea of guilty and a conviction based on such plea waives all nonjurisdictional defects such as alleged by petitioner in his second, third and fourth contentions. *Hoffman v. United States*, 9 Cir., 327 F. 2d 489 (1964); *Adkins v. United States*, 8 Cir., 298 F. 2d 842 (1962), cert, den. 370 U. S. 954, 82 S. Ct. 1604, 8 L. Ed. 2d 819; *Bloombaum v. United States*, 4 Cir., 211 F. 2d 944 (1954). Being of the opinion that the petitioner's plea was voluntary, the Court will only consider in this Memorandum the first contention of the petitioner.

This Court may deny petitioner a hearing and accept the findings of fact of the state court if petitioner has been given a full and fair hearing in the state court and its findings of fact meet the required standards. *Townsend v. Sain*, 372 U. S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *United States v. Wilkins*, 2 Cir., 333 F. 2d 742 (1964), cert. den. 379 U. S. 977, ... S. Ct. ....., ...L. Ed. 2d .....; *United States ex rel. Hall v. People of State of Illinois*, 7 Cir., 329 F. 2d 354 (1964), cert. den. 379 U. S. 891, ... S. Ct. ....., ...L. Ed. 2d .....; *Davis v. Holman*, 237 F. Supp. 490 (M.D. Ala. 1965); *Mills v. Holman*, 225 F. Supp. 886 (M.D. Ala. 1964).

The Supreme Court of the United States in *Townsend v. Sain*, 373 U. S. 293, 312, 313, sets forth the rules and standards for federal courts to follow in accepting the findings of fact of the state court by saying:

> "* * * In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.
>
> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

With these standards in mind and after giving consideration to the record as a whole, including the transcript of the post-conviction hearing, the Court finds that the merits of the petitioner's contention that his plea of guilty was not voluntary has been properly and judiciously resolved after a full and

fair hearing, and the Findings of Fact and Conclusions of Law made by Judge Armstrong are fully supported by the record as a whole. At the post-conviction hearing, the petitioner was represented by court-appointed counsel, and the following persons testified: Fred G. Crumpler, court appointed attorney for petitioner at his trial and who petitioner alleges coerced him into making a plea of guilty; Mrs. Christine Green, sister of the petitioner; Robert Haskins, Deputy Clerk of the Superior Court of Forsyth County and who petitioner alleges also coerced him into entering a plea of guilty; and the petitioner. The material facts were developed at the hearing, and no allegation of newly discovered evidence was made at the time of the hearing or now. The Court can find no reason that would indicate that the petitioner was not given a full and fair hearing, and concludes that the post-conviction hearing and the findings of fact from that hearing meet all the required tests. Therefore, the Court adopts the Findings of Fact of the state court.

Judge Frank M. Armstrong, who presided over the post-conviction hearing of the petitioner at the December 7, 1964, Term of Superior Court of Forsyth County in his order dated March 19, 1965, found that the petitioner's plea of guilty was voluntary. Judge Armstrong stated:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to

him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so.

"That the petitioner willingly, knowingly and understandingly entered a plea of guilty to murder in the second degree on December 10, 1963, in the Superior Court of Forsyth County and was sentenced to serve a term of thirty years in the State's Prison."

The Court is cognizant of the fact that it can only adopt the facts found by the state court, and the Court must supply the applicable law. *Townsend v. Sain, supra.* However, by adopting the state court's findings as to the voluntariness of

the petitioner's plea of guilty, the conclusion follows that the sentence was imposed after a valid guilty plea and the plea was sufficient without more to warrant a conviction. *Armpriester v. United States*, 4 Cir., 256 F. 2d 294 (1958), cert. den. 358 U. S. 856, 79 S. Ct. 88, 3 L. Ed. 2d 90.

The Court finds that petitioner has not been denied his constitutional rights; therefore, the relief sought is denied.

ORDER

IT IS ORDERED that the petition for writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed.

IT IS FURTHER ORDERED that the Clerk forward a certified copy of this Memorandum and Order to the Petitioner at the place of his confinement.

EUGENE A. GORDON
United States District Judge

A True Copy
Teste
Herman Amasa Smith, Clerk
By: Bobbie D. Wyont
Deputy Clerk
September 3, 1965

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 10,391

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, appeals in forma pauperis from an order of the District Court.

Alford was convicted upon a plea of guilty of second degree murder and sentenced to thirty years by the Superior Court of Forsyth County. He did not appeal, but later instituted postconviction proceedings in the state court to collaterally attack the validity of his conviction.

On December 7, 1864, Alford was granted a plenary hearing by the state court. At the hearing he was represented by court-appointed counsel who urged that Alford's guilty plea was the product of fear and coercion and the inadequate representation of counsel. The state court denied Alford's petition for relief. Thereafter Alford petitioned the United States District Court for the Middle District of North Carolina (Gordon, J.) for a writ of habeas corpus. The District Court entered a show cause order and the State answered. Included in the answer was a transcript of the state-court hearing and the opinion of the state judge. On the basis of the record the

District Court determined that Alford had not been denied any right which would justify the issuance of the writ and dismissed the petition.

Forty-eight days after the District Court's order denying the writ was entered Alford filed a notice of appeal. The District Court considered the notice as "a motion in the cause to allow an appeal and a motion for a new hearing." (Rec. 4). Both were denied for the reasons set forth in the District Court's memorandum order. (Rec. 3-8). From that denial Alford appeals in forma pauperis.

The District Court was correct in denying Alford's motions. The record in the case clearly shows that he failed to attempt an appeal until well after the thirty-day time limit had expired. Moreover, there was no reason given why the case should be reopened in the District Court. That Court does not have to entertain successive writs. 28 U.S.C. §§ 2244, 2253.

There is no danger of injustice based upon a procedural technicality in this case. Alford has also submitted a petition for a writ of habeas corpus to a judge of this Court and that petition will be considered on the merits.

Accordingly the appeal is dismissed and a certificate of probable cause is denied.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Harrison L. Winter
United States Circuit Judge

J. Braxton Craven, Jr.
United States Circuit Judge

A true copy, Teste:
Maurice S. Dean, Clerk,
U.S. Court of Appeals
for the Fourth Circuit.

Appendix D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 220

Henry C. Alford,

Appellant,

versus

State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro.

MEMORANDUM DECISION

Henry C. Alford, a North Carolina prisoner, has petitioned in forma pauperis for a writ of habeas corpus.

Alford's unsuccessful petition in the District Court has been noted in another case (No. 10,391). I have obtained a supplement to the record in No. 10,391 and after reviewing the files, transcript and other papers I have concluded that Alford is not entitled to a writ of habeas corpus.

Alford's petition is based upon several contentions. We turn first to the claim that his guilty plea was the product of fear and coercion as well as the ineffective assistance of counsel.

The record includes a transcript of a plenary hearing in a state court during Alford's unsuccessful attempt to avail himself of North Carolina's postconviction relief statute. The transcript reveals that Alford was represented by an experienced criminal lawyer who conferred with him on "numerous" occasions before trial. (Tr. 3).

There is a conflict in the testimony over why Alford actually pleaded guilty but the state court found that he did so because his attorney wisely advised him to plead guilty to second degree murder and escape the possibility of capital punishment. The state court also found that the attorney interviewed all the witnesses Alford named with the exception of one, who could not be located. (Supp. to Rec. preceding p. 37). The state judge found that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact and I see no reason to disagree with it.

Having found that Alford's guilty plea was voluntarily made upon the competent advice of counsel, there is no reason to inquire into the claims Alford raises regarding illegal search and seizure, denial of witnesses and illegal detention. See *Hoffman v. United States*, 9 Cir., 327 F. 2d 489.

The District Court reached the same conclusion after a thorough explanation of the facts. (Supp. to Rec. pp. 37-44). I am of the opinion that the District Court's interpretation of the applicable facts and law is correct and therefore it is unnecessary to repeat either in detail.

The petitioner is allowed to proceed in forma pauperis but his petition is denied. Pursuant to 28 U.S.C.A. § 2241 (a) this order shall be entered in the records of the United States District Court for the Middle District of North Carolina.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

HENRY C. ALFORD, Petitioner	)	
v.	)	NO. C-98-G-67
STATE OF NORTH CAROLINA Respondent	)	

MEMORANDUM OPINION AND ORDER

GORDON, District Judge

The petitioner, Henry C. Alford, a prisoner of the State of North Carolina, has filed with this Court still another petition for a writ of habeas corpus pursuant to the provisions of Title 28, U.S.C. § 2254, and accompanies the petition with an affidavit of poverty. The petition was filed *pro se* and an order has been entered permitting the petition filed without the prepayment of cost for fees or security therefor. The petitioner contends his constitutional rights were deprived in that:

1. His home was searched without a search warrant being issued.

2. He was denied his right to counsel at an interrogation.

3. He was denied the effective assistance of counsel.

The voluminous files in this case reflect that this is the third petition for a writ of habeas corpus directed to the Federal Courts to be dealt with on its merits; this in addition to numerous collateral attacks directed through state court channels.

On September 7, 1965, his first petition for a writ of habeas

corpus was denied in a Memorandum Opinion from this Court which dealt sufficiently with petitioner's trial and state post-conviction hearing that they need not be reiterated here.

Since September 7, 1965, petitioner's motion to appeal from the above decision after the lapse of the requisite time limit was denied by Memorandum and Order dated November 24, 1965. This denial was affirmed on appeal.[1] On December 8, 1965, a petition for a writ of habeas corpus was filed directly with the United States Court of Appeals for the Fourth Circuit. In a Memorandum Decision dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. Numerous other petitions and motions have been before this Court, but do not affect the merits of this present petition and require no discussion.

Petitioner raises substantially the same contentions in this petition as have been raised in the two previous federal petitions. Both Memorandum Decisions denying petitioner relief have held that his guilty plea was voluntary. This determination precludes any consideration of the first and second contentions in the present petition because the voluntary guilty plea waives all defenses and non-jurisdictional defects occurring in any prior stage of the proceedings against the person so pleading. *U.S. v. McMann*, 2 Cir., 349 F. 2d 1018 (1965); *Busby v. Holman*, 5 Cir., 356 F. 2d 75 (1966); *Bloombaum v. U.S.*, 4 Cir., 211 F. 2d 944 (1954).

In his third contention, the petitioner raises a question as to the competency of his counsel and the effectiveness of his assistance. Although Judge Haynsworth touched upon this allegation, it will be dealt with on its merits.

It is now well settled that a federal hearing is unnecessary if the petitioner received a full and fair evidentiary hearing in a state post conviction proceeding in accordance with the standards set out in *Townsend v. Sain*, 372 U.S. 293 (1963)[2]. This

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1U.S.C.A., 4 Cir., Case #10,391, Memorandum Decision filed August 25, 1966.

2*Duckett v. Steiner*, 4 Cir., 332 F. 2d 178 (1964).

court can accept the findings of fact of the state court to which facts this Court must apply federal law.

On the basis of the post-conviction hearing, Judge Frank M. Armstrong entered an order on March 19, 1965, which made certain applicable findings of fact:

> "That on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford, who was charged in a bill of indictment with the crime of murder in the first degree. That Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963. That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer, with extensive experience in the trial of criminal cases, made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information. That the said attorney contacted all witnesses named to him by the defendant, except a person designated as 'Jap,' who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming and that the petitioner was confronted with a very serious case of murder. That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case. That the petitioner, after talking to his attorney and his sister, decided that he wanted to enter a plea of guilty to second degree murder and he signed a written statement in which he authorized his attorney to enter a plea of guilty of second degree murder in his behalf, said statement being sworn to before Mr. R. B. Haskins, a Deputy Clerk of

the Superior Court. That Mr. Haskins read the statement to the petitioner and asked him if he understood it and the petitioner said he did, and that he stated that he wanted to sign it and that he did sign it under oath in the presence of the said Deputy Clerk. That thereafter on December 10, 1963, the petitioner through his counsel, entered a plea of guilty to murder in the second degree; that the petitioner's attorney did not persuade him to enter the said plea nor coerce him to do so."

Upon this set of facts it is conclusive that petitioner's counsel was not constitutionally defective under the applicable standards. *Tompa v. Virginia*, 4 Cir., 331 F. 2d 552 (1964).

This Court, having found petitioner has not been denied his constitutional rights, denies the petition and the relief sought therein.

ORDER

IT IS ORDERED that the petition for the writ of habeas corpus filed by the petitioner, Henry C. Alford, be, and the same is hereby denied and dismissed. IT IS FURTHER ORDERED THAT the Clerk forward a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

June 1, 1967

A True Copy
Teste:
Herman Amasa Smith, Clerk

By:

Judy A. Mabe
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INDEX

TABLE OF CASES CITED

STATUTES INVOLVED

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MISCELLANEOUS

In The

Supreme Court of the United States

October Term, 1968

No. 1064

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLANT

Joined in and Adopted by the States of Arkansas, Delaware, Illinois, Kentucky, Mississippi, and Montana, The Virgin Islands, and The National District Attorneys Association, Appearing as Amici Curiae.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (A. pp. 27-46) is reported as HENRY C. ALFORD v. STATE OF NORTH CAROLINA, 405 F. 2d 340 (4th Cir. 1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (2). Probable jurisdiction was noted on April 7, 1969.

QUESTIONS PRESENTED

I. IS THE NORTH CAROLINA STATUTORY SCHEME

FOR THE IMPOSITION OF A DEATH PENALTY UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U.S. 570 (1968)?

II. ARE GUILTY PLEAS INVALID BY FORCE OF UNITED STATES v. JACKSON, *SUPRA*, WHEN THE DEFENDANT WAS INDICTED FOR A CAPITAL OFFENSE AND WAS SENTENCED TO LIFE IMPRISONMENT UPON HIS ENTRY OF A PLEA OF GUILTY TO THAT CAPITAL OFFENSE?

III. ARE GUILTY PLEAS INVALID BY FORCE OF UNITED STATES v. JACKSON, *SUPRA*, WHEN THE DEFENDANT WAS INDICTED FOR A CAPITAL OFFENSE AND ENTERED A PLEA OF GUILTY TO A LESSER INCLUDED OFFENSE PUNISHABLE NOT BY DEATH BUT BY A TERM OF YEARS?

IV. IS THE HOLDING IN UNITED STATES v. JACKSON, *SUPRA*, TO BE RETROACTIVELY APPLIED?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Sixth Amendment to the Constitution provides as follows:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

At the December 2, 1963 Term of the Superior Court of Forsyth County, North Carolina, Henry C. Alford was indicted for the Murder in the First Degree of Nathaniel Young, and Fred G. Crumpler, Esq., of the Winston-Salem, North Carolina, Bar was appointed as his counsel.

Counsel thoroughly investigated the case, including the questioning of the investigating officers and all witnesses for the State. Counsel also contacted all witnesses named to him by Alford, except for a person named "Jap" who could not be located. Counsel found that none of the witnesses would be helpful to Alford, but that all of their testimony was detrimental and concluded that the State's case against Alford was overwhelming.

Counsel discussed this matter with Alford on several occasions, advised him of the testimony of the witnesses against him, and also advised him of the possible jury verdicts. Alford, after discussing the situation with counsel and his sister, who had been contacted by counsel, decided to enter a plea of guilty to second degree murder and signed a statement, read to him by Mr. R. B. Haskins, a Deputy Clerk of the Superior Court of Forsyth County, authorizing the entry of the plea of guilty to second degree murder.

On December 10, 1963, Alford, through counsel, entered a plea of guilty to second degree murder. Subsequent to the presentation of witnesses, Alford took the stand. Alford admitted that he had been advised of his rights and he had authorized the entry of the guilty plea. He repeatedly admitted the entry of the plea, the weight of the evidence against him,

and his continuing desire to enter the plea of guilty to second degree murder, although he did qualify his statement with a continuing denial of guilt. Alford also admitted to a homicide conviction in Virginia, nine convictions of armed robbery and a lengthy list of other convictions. Before the guilty plea was accepted, there was a statement of the State's evidence, including declarations by Alford a few moments before the homicide of his purpose to kill the victim and admissions, shortly thereafter, that he had done it. The plea of guilty to second degree murder was accepted and Alford was sentenced to a term of thirty (30) years. He did not appeal.

Subsequently, Alford applied for a Writ of Certiorari to the Supreme Court of North Carolina, but the Writ was denied on March 24, 1964, and the case remanded for a post-conviction hearing in the Superior Court of Forsyth County. At the December 7, 1964 Term of the Superior Court of Forsyth County, Alford was given a plenary hearing before Judge Frank M. Armstrong. On March 19, 1965, Judge Armstrong entered an Order containing findings of fact and conclusions of law denying the relief sought by Alford. Alford then requested a Writ of Mandamus from the Superior Court of Forsyth County which was denied on April 14, 1965. He then applied for another post-conviction hearing which was denied on May 3, 1965. Alford did not apply for a Writ of Certiorari to the Supreme Court of North Carolina to review the Order of Judge Frank M. Armstrong.

Alford filed his first application for a Writ of Habeas Corpus with the United States District Court for the Middle District of North Carolina on June 16, 1965. On June 18, 1965, the Court entered an Order dismissing the application since Alford was not within the jurisdiction of the Middle District Court. Alford was subsequently transferred within the jurisdiction of the Middle District Court of North Carolina and the Court was so advised. The Court thereupon entered an Order considering the paper-writing as a motion to reconsider the petition which the Court granted. The Court had the benefit of

the transcript of the State post-conviction hearing and adopted the findings of fact of the State Court. In a lengthy opinion, District Judge Eugene A. Gordon found Alford's plea to be voluntary and denied the relief sought. (Memorandum and Order, Case No. C-112-G-65, A. pp. 12-18).

Forty-eight days after the District Court's Order denying the Writ, Alford filed a Notice of Appeal. The District Court considered the Notice as a "Motion in the Cause to Allow an Appeal and a Motion for a New Hearing." Both were denied and from that denial Alford appealed. The Court of Appeals for the Fourth Circuit in Memorandum Decision No. 10,391 affirmed the denial. (A. pp. 21-22).

On December 8, 1965, a petition for a Writ of Habeas Corpus was filed directly in the United States Court of Appeals for the Fourth Circuit. In a Memorandum Opinion dated August 3, 1966, the Honorable Clement F. Haynsworth denied the petition. (Memorandum Decision No. 220, A. pp. 19-20).

Alford filed still another petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of North Carolina. The Honorable Eugene A. Gordon again considered Alford's various contentions and once more concluded that none of his constitutional rights had been violated and denied the petition. (Memorandum Opinion and Order, Case No. C-98-G-67, A. pp. 23-26).

Alford then appealed to the United States Court of Appeals for the Fourth Circuit to review the summary denial by Judge Gordon in Memorandum Opinion and Order No. C-98-G-67, filed June 5, 1967, and the Fourth Circuit Court of Appeals concluded that, under the guiding principles of UNITED STATES v. JACKSON, 390 U. S. 570 (1968), enunciated subsequent to the judgment of the District Court, that the judgment appealed from should be reversed and in so doing held not only "that in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional," and hence capital punish-

ment may not, under JACKSON, be imposed under any circumstances," but went beyond the holding in UNITED STATES v. JACKSON, *supra*, in holding that JACKSON is applicable when the defendant pleads guilty to a lesser included offense punishable only by a term of years and not by death. (A. p. 34).

The State of North Carolina appealed the opinion of the Fourth Circuit to this Court and on April 7, 1969, probable jurisdiction was noted.

ARGUMENT

I.

THE NORTH CAROLINA STATUTORY SCHEME FOR THE IMPOSITION OF A DEATH PENALTY IS NOT UNCONSTITUTIONAL BY FORCE OF UNITED STATES v. JACKSON, 390 U. S. 570 (1968).

The Federal Kidnaping Act, 18 U.S.C. Section 1201(a) provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

This statute created an offense punishable by death "if the verdict of the jury shall so recommend."

This Court in UNITED STATES v. JACKSON, 390 U. S. 570 (1968), described the question presented as follows:

> "Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands

forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. *Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.* The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." (Emphasis added.)

In UNITED STATES v. JACKSON, *supra*, this Court held the selective death penalty provision of the Federal Kidnaping Act imposes an "impermissible burden upon the assertion of a Constitutional right". We submit the decision in JACKSON is limited to the statutory scheme established by the Federal Kidnaping Act, does not have wider applicability, and is not applicable to this situation where Alford pled guilty to a lesser offense, punishable only by a term of years, and not by death.

The Federal Rules of Criminal Procedure permit a defendant to plead guilty, or plead not guilty and be tried by a jury, or plead not guilty and waive a jury trial. (See Rule 23(a) of the Federal Rules of Criminal Procedure.) Thus the defendant charged with kidnaping who asserts his right to a jury trial, faces "the risk of death" as the price of his "free exercise" of that Constitutional right. UNITED STATES v. JACKSON, *supra*.

A Federal jury trying a defendant pursuant to the provisions of the Kidnaping Act, until the JACKSON case, acted in a dual capacity. The jury was the trier of the facts, determining either guilt or innocence. If the jury found the defendant guilty, it then possessed the authority to designate the death penalty, thereby increasing the punishment imposed upon the defendant beyond the authority granted to the court in sentencing the convicted defendant.

The North Carolina Constitution, Article 1, Section 13, prohibits a trial upon a plea of not guilty "but by the unani-

mous verdict of a jury of good and lawful persons in open court . . . ." This right cannot be waived. The defendant cannot plead not guilty and waive a jury trial. The determinative facts must be found by a jury. STATE v. MUSE, 219 N. C. 226, 13 S. E. 2d 229 (1941); STATE v. HILL, 209 N. C. 53, 182 S. E. 716 (1935).

A defendant charged with a capital crime (first degree murder, first degree burglary, arson and rape) may plead not guilty and be tried by a jury, or he may plead guilty, and if the court accepts the plea, the defendant must be sentenced to life imprisonment.[1] (See A. p. 47). If the defendant pleads not guilty and if the jury finds him guilty, the penalty is death unless the jury recommends mercy. (A. pp. 47-48).

The death sentence is imposed by statute upon the jury's finding the defendant guilty of a capital crime. The jury is not, as in the JACKSON case, usurping the province of the judge in sentencing the defendant, but serving as the trier of the facts. However, the jury is given the discretion in each of the capital crimes to recommend life imprisonment. This procedure parallels 18 U.S.C.A., Section 1111, wherein the penalty for murder in the first degree within Federal Jurisdiction is death, unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. The North Carolina jury in a capital case, as a Federal jury in a first degree murder case, is given the power to eliminate the automatic imposition of the death penalty upon a conviction of a capital crime.

The ability of the jury to mitigate the statutory punishment is contra to the unconstitutional burden imposed upon the defendant in the Federal Kidnaping Act. The North Carolina capital jury is given the ability to recommend mercy upon a capital conviction. The Federal jury, and only the jury, upon a conviction for kidnaping had the ability to impose the death

1. N.C.G.S. 15-162.1 (plea of guilty of first degree murder, first degree burglary, arson or rape) was repealed by the 1969 Session of the North Carolina General Assembly on March 25, 1969. (Session Laws 1969, Ch. 117)

penalty, rather than permit the court to impose a sentence for any term of years or for life.

In reviewing the differences between the Federal Kidnaping Act and the North Carolina Statutes, the Supreme Court of North Carolina in STATE OF NORTH CAROLINA v. OTIS EUGENE PEELE, 274 N. C. 106, 111, 161 S. E. 2d 568, 572 (1968) stated:

> "We think there are certain material differences in the Federal Kidnaping Act and in North Carolina Statutes 14-21 and 15-162.1, and that JACKSON is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnaping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G.S. 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty, which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute. Except as provided in G.S. 15-162.1, the North Carolina practice will not permit a defendant to plead guilty to a capital felony. G.S. 15-187 provides the death sentence shall be executed '. . . against any person in the State of North Carolina *convicted* of a crime punishable by death . . . .' (Emphasis added.)
>
> "G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under

> rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life. As stated in the JACKSON case, there are 'defendants who would greatly prefer not to contest their guilt.' Practical experience indicates only in extreme cases does the jury fail to recommend life imprisonment rather than the death penalty. The possibility of a death penalty, however, has deterring effect—how much, no one knows. . . ."

Additionally, an examination of the legislative history of the Federal Kidnaping Act and of the various North Carolina Statutes declared unconstitutional by the Fourth Circuit further reveals the inapplicability of JACKSON. The Federal Kidnaping Act, as originally enacted in 1932, contained no provision for capital punishment. The 1934 amendment inserted the provision authorizing the death penalty "if the verdict of the jury shall so recommend." The decision in JACKSON held this amendment unconstitutional. Prior to 1934 a defendant could contest his guilt without risk of death. Under the 1934 amendment he could not.

Until 1949, the death penalty was automatically imposed in North Carolina upon a defendant convicted of a capital offense. The defendant, if convicted of a capital offense, received the only sentence permitted by law, death. However, in 1949, the proviso was added by amendment to each capital offense permitting the jury to recommend life imprisonment.

N.C.G.S. 15-162.1 was not enacted until 1953. Prior to 1953, a capital defendant could not plead guilty to the capital charge. It is evident that N.C.G.S. 15-162.1 and the provisos added in 1949 to the various capital crimes permitting the jury to recommend life imprisonment are separate and distinct legislative provisions.

The legislative history of the Federal Kidnaping Act and the various North Carolina statutory provisions declared uncon-

stitutional by the Fourth Circuit are so dissimilar that JACKSON cannot be held to be a basis for declaring invalid the North Carolina statutory scheme.

The North Carolina statutory scheme consisted of separate, distinct statutes, passed at separate times and each capable of standing alone, unlike the unitary scheme presented in the Kidnaping Act.

II.

THE JACKSON DECISION DOES NOT INVALIDATE GUILTY PLEAS ENTERED TO CAPITAL INDICTMENTS.

In JACKSON, *supra*, this Court held the infirmity of the death penalty provision of the Federal Kidnaping Act severable from the remainder of the Act, leaving the remainder in full force, and remanded for the entry of a plea free from the burden of the death penalty. In POPE v. UNITED STATES, 392 U. S. 651, 20 L. ed. 2d 1317, 88 S. Ct. 2145, based upon JACKSON, this Court held the death penalty provisions of the Federal Bank Robbery Act (18 U.S.C. Sec. 2113(e)) was invalid but the remainder of the Statute, the death penalty provision being separable, was valid. In JACKSON the defendant was yet to enter a plea to the indictment and in POPE the defendant was convicted by a jury and sentenced to death. Neither case is authority for the issue here presented. "Are all pleas of guilty in a statute containing a JACKSON type defect invalid?" We submit not. JACKSON is not authority for a conclusion of such broad constitutional impact and should not be applied to void every conviction where a defendant has entered a guilty plea. This Court stated in JACKSON that the Kidnaping Act "needlessly" penalized a defendant who stood on his right to plead not guilty before a jury—and Mr. Justice Stewart stated that defendants who acknowledged their guilt and wish to avoid the ignominy of public trial have traditionally been allowed to plead guilty, and, in addition, that a

flexible and efficient judicial system requires the use of guilty pleas.

N.C.G.S. 15-4.1 provides, *inter alia*:

> ". . . , but a defendant without counsel cannot plead guilty to an indictment charging a capital felony. . . ."

The right to counsel in capital felonies has been recognized in North Carolina since the very establishment of this State. In STATE v. HEDGEBETH, 228 N. C. 259, 45 S.E. 2d 563 (1947), the North Carolina Supreme Court said:

> "The Constitution of North Carolina, Art. I, sec. 11, contains this provision: 'In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself, or to pay costs, jail fees or necessary witness fees of the defense, unless found guilty.' And this constitutional provision is further implemented by statute (G.S., 15-4) in these words: 'Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense.' (Session Laws 1777, C. 115).
>
> "*In capital felonies these provisions relative to counsel are regarded as not merely permissive but mandatory. This is indicated by the statute, G.S. 15-5, and by numerous decisions of this Court. . . .*" (Emphasis added.)

It is evident in this case Alford's court-appointed counsel was extremely diligent in his behalf in securing the entry of a plea to second degree murder. Yet, in a larger sense, the North Carolina Constitution and applicable statutes clearly reveal that guilty pleas to capital offense are serious matters which must satisfy many constitutional, statutory and procedural requirements before they are accepted.

Furthermore, N.C.G.S. 15-162.1 (plea of guilty of first de-

gree murder, first degree burglary, arson or rape) provided for punishment by life imprisonment when a plea of guilty was entered to the capital crime. A state legislature can provide for the tender of a plea, and for the punishment by life imprisonment upon acceptance of the plea.

In JACKSON, the issue arose in the context of a burden being placed upon a plea of not guilty where only a jury trial upon that plea, but not a bench trial, could result in the death penalty. JACKSON is authority to void a scheme such as that presented in the Kidnaping Act, which burdened a defendant's right to a jury trial upon a plea of not guilty. It is not authority to hold invalid guilty pleas.

Not having previously spoken directly on the issue of defendants who plead guilty to capital offenses, and in light of the various safeguards imposed prior to the acceptance of such pleas, this Court should not hold void all pleas entered in a procedure so firmly entrenched in the history of the judicial system.

III

THE JACKSON DECISION IS NOT APPLICABLE TO PLEAS TO LESSER INCLUDED OFFENSES WHEN THE DEFENDANT WAS ORIGINALLY INDICTED FOR A CAPITAL FELONY.

Although the State of North Carolina is appealing from the holding of the Fourth Circuit in its application of JACKSON, we emphasize yet another defect in ALFORD arising from the factual basis of this case, by quoting at length from Chief Judge Haynsworth of the Fourth Circuit in his dissent as he aptly describes the non-applicability of JACKSON to lesser plea situations, and Alford s plea in particular:

> "I disagree, for I think a critical difference lies in the fact that Alford did not enter a plea of guilty to the charge of murder in the first degree. His plea of guilty was to the lesser offense of murder in the second degree, the maximum

statutory punishment for which is imprisonment for not more than thirty years . . . .

* * *

"The plea of guilty to murder in the second degree, however, was not the product of the constitutional infirmity in the statute. Had the infirmity not been present, the risk of capital punishment on a conviction of murder in the first degree would have constituted precisely the same pressure for a plea of guilty to a lesser included offense. Had North Carolina's statute provided that upon a conviction of murder in the first degree, whether after a trial on a plea of not guilty or after acceptance of a plea of guilty, the judge in his discretion could impose the death sentence, or imprisonment for life or for a term of years, there would have been no constitutional defect in the statute. Yet, in those circumstances, the pressure upon Alford to enter a plea to murder in the second degre would not have differed in the slightest from the pressure he actually experienced.

". . . If he is well advised, he will again tender a plea of murder in the second degree. He will have gained nothing, and needless time and money will have been expended because of an infirmity in the statute which bears no causal relationship to the entry of the plea which the majority strikes.

"Whenever a defendant bargains for a plea to a lesser, included offense, he is substantially motivated by fear of exposure to the greater punishment authorized upon conviction of the crime as charged. If the maximum punishment for the greater offense is death, there are emotional overtones which are not present if the maximum punishment is imprisonment for life or for a term of years, but the presence of a risk of capital punishment creates no conceptual distinction in a determination of the validity of bargaining for a plea to a lesser, included offense. The

death penalty is no longer imposed with frequency, and a defendant may have a greater fear of the risk of a more likely sentence of life imprisonment than of the risk of less likely capital punishment. A difference in the prospect of imprisonment of one year rather than ten, of five years rather than twenty, of twenty years rather than life can weigh momentously with a defendant.

"Such plea bargaining, when the defendant is properly represented, is both useful and desirable in the administration of justice. It greatly conserves judicial time and energy, leaving the courts available for the trial of cases in which there is no basis for accommodation between the parties. It is a very humane avenue of protection for a person charged with crime who recognizes his exposure to the risk of heavy punishment.

"There is nothing in JACKSON which intimates disapproval of that kind of plea bargaining. Its absence, or the absence of agreement, is the thing that produced the JACKSON dilemma. Yet, that is all that happened here. Alford successfully bargained for a plea to a lesser included offense, which made him immune to life imprisonment as well as to capital punishment. He would have done the same thing had the capital punishment provision of the statute not been constitutionally defective. He may be expected to do the same thing again at his retrial. In JACKSON the statutory defect created the issue, here it has no causal connection with it." 405 F. 2d at 349-351. (A. pp. 41-44).

We submit that a defendant, charged with a capital felony, who is represented by counsel, does not act under coercion when, on the strength or weight of the evidence establishing his guilt, he pleads guilty to murder in the second degree or manslaughter, voluntary or involuntary. Neither, does a defendant charged with rape act under coercion, when he pleads guilty to an assault with intent to commit rape or an assault

on a female by a male person over the age of eighteen (18) years. Nor under like circumstances, does a defendant charged with burglary in the first degree, arson, or any other felony, act under coercion when he pleads guilty to a lesser degree of the same crime, or an attempt to commit the crime so charged, or an attempt to commit a lesser degree of the crime so charged. Similarly, we submit that a defendant charged with a felony is not acting under coercion when he pleads guilty to an included misdemeanor.

There can be no doubt that when a defendant pleads guilty to an included crime of a lesser degree, both he and his counsel take into consideration the evidence of the State, the evidence available to the defendant, and all other factors pertinent to the advisability of tendering such plea, including the possibility of conviction by the jury of the crime as charged, or of a more serious lesser degree of the crime as charged, and the possibility of greater punishment as a result of the conviction of the original charge or a higher included degree of a lesser charge.

The *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty* (Tent. Draft 1967) states:

> "The plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.
>
> ". . . Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for

> funds and personnel. . . . Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.
>
> "It may thus be concluded that the frequency of conviction without trial not only permits the achievement of legitimate objectives . . . but also enhances the quality of justice in other cases as well."

We submit in JACKSON this Court recognized the utility of the guilty plea and it would be tragic indeed if JACKSON denies this time honored method of determining guilt without trial, with the attendant burden that will be placed on all courts.

The Fourth Circuit, in striking down the obvious plea bargaining situation in ALFORD, expressly sanctioned plea bargaining in a later yet unpublished decision, UNITED STATES OF AMERICA v. WILLIAM DOVE WILLIAMS, ... F.2d ..... (4th Cir., March 5, 1969) with these words:

> *"We think that plea bargaining serves a useful purpose both for society and the prisoner and is a permanent part of the criminal courtroom scene,* . . . Here it seems rather obvious that in return for guilty to one count permitting the court ample latitude for adequate punishment (ten years) the prosecutor agreed, *quite properly we think,* to dismiss the other counts. Why not say so?" (Empasis added.)

IV.

THE JACKSON DECISION SHOULD NOT BE RETROACTIVELY APPLIED.

The rule relating to retroactivity was stated by this Court in STOVALL v. DENNO, 388 U. S. 293, 18 L. Ed. 2d 1999, 87 S. Ct. 1967 (1967) as follows:

"Our recent discussions of the retroactivity of other con-

stitutional rules of criminal procedure make unnecessary any detailed treatment of that question here. LINKLETTER v. WALKER, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601, *supra;* TEHAN v. UNITED STATES ex rel SHOTT, (382 U. S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453,) *supra;* JOHNSON v. STATE OF NEW JERSEY, (384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882,) *supra.* 'These cases established the principle that in criminal litigation concerning constitutional claims, "the Court may in the interest of justice make the rule prospective * * * where the exigencies of the situation require such an application" * * *' JOHNSON, *supra* 384 U. S., at pp. 726, 727, 86 S. Ct. at 1777. *The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.*" (Emphasis added).

In UNITED STATES OF AMERICA ex rel BUTTCHER v. YEAGER, 288 F. Supp. 906, 909, District Judge Coolahan, in discussing the possible retroactive impact of JACKSON on the State of New Jersey, said:

"In addition, the countervailing factors mentioned in the STOVALL decision are most strong in the circumstances of the present case. There can be no doubt that the New Jersey courts and law enforcement authorities have, since 1893, relied on the present system by which defendants pleading non vult to a murder indictment cannot be sentenced to more than life imprisonment. See STATE v. SULLIVAN, 43 N. J. 209, 243, 203 A. 2d 177 (1964). Furthermore, the effect on the administration of justice, should it be determined that the JACKSON decision is both retroactive and applicable to the New Jersey murder statute, would be disastrous, as every convicted murderer in New Jersey who, at the scheduled time for

his trial, pleaded non vult to the indictment against him would be forthwith released from incarceration. This Court cannot conclude that the JACKSON decision is retroactive."

In KINCAID WILSON v. STATE OF NORTH CARO,-LINA, No. 2216, (E.D.N.C., February 27, 1969), District Judge Larkins in commenting upon the possible retroactivity of the ALFORD decision, stated:

"Another factor in the determination of the retroactive operation of a decision is the 'effect on the administration of justice.' TEHAN v. SHOTT, 382 U. S. 406, 418, 15 L. Ed. 2d 453, 461, 86 S. Ct. 459 (1966). In the TEHAN case, GRIFFIN v. CALIFORNIA, 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965), was not given retroactive operation because to 'require all those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.' TEHAN v. SHOTT, *supra*, 382 U. S. 406, 419. Since far more persons plead guilty than go to trial, the retroactive operation of ALFORD would be even more devastating.

"After full consideration of all the factors, this Court is not able to say that the rule in ALFORD v. STATE OF NORTH CAROLINA, *supra*, requires retroactive operation. This Court rejects the idea that if a statute was in force in 1963, and in 1968 its construction is changed so that it is no longer in force, it should be concluded that it was never in force. Quoting Justice Vinson in WARRING v. COLPOYS, 122 F. 2d 642, 647, certiorari denied 314 U. S. 678, 86 L. Ed. 543, 62 S. Ct. 184, 'It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity,

> for that, in turn, would be down right chaotic.' Accordingly, the ALFORD rule shall only be applicable to those criminal actions commencing after November 26, 1968."

Commenting further upon ALFORD, District Judge Larkins, in CARMICHAEL v. STATE OF NORTH CAROLINA, No. 2102 (E.D.N.C., April 15, 1969) said:

> ". . . the retroactive application of ALFORD would seriously disrupt the administration of the criminal laws within the State of North Carolina. If ALFORD were to be retroactively applied it could arguably necessitate the retrial of all defendants who have heretofore been convicted upon their pleas of guilty to indictments charging one of the capital crimes, or who, having been indicted for a capital offense, plead guilty to lesser included offenses. The Constitution does not require such a result. LINKLETTER v. WALKER, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965)."

The ruling in JACKSON as extended by ALFORD, was not foreshadowed in any case. No court announced such a requirement until the Fourth Circuit extended the holding in ALFORD. The law enforcement authorities of the Federal Government and of all the states and territories have heretofore proceeded on the premise that such procedures, as now condemned, were constitutional. The various statutory schemes condemned in JACKSON and ALFORD were assumed to be constitutional by the Federal Government, and the governments of the various states and territories. The impact of no other decision of this Court, except for GIDEON v. WAINWRIGHT, 372 U. S. 335 (1966), can have such an impact upon the administration of justice. Court calendars will be disrupted nationally, and post-conviction proceedings overwhelmed, if JACKSON and ALFORD are retroactively applied. Delay is well known as the best friend of defense counsel, and if retrials are now required, now that memories have faded and witnesses and evidence are no longer available, we could expect that

prison gates would be opening wide to all capital felons convicted upon their pleas of guilty due to the weight of evidence of their guilt amassed years previously at their trials, but now, most probably, no longer available. The results are so frightful and devastating that further comment should not be required.

North Carolina cannot present empirical statistics of the number of convictions obtained upon pleas of guilty to lesser included offenses when the defendant was indicted for a capital felony. This would involve a case by case review of every conviction inasmuch as there is no way of telling for which particular crime an inmate may originally have been indicted. However, our studies have shown that as of February 1, 1969, there were 448 inmates serving life sentences and a review of twenty percent (20%) of all files of these inmates produce the finding that 68.8% of all inmates serving life sentences were convicted upon pleas of guilty to capital charges and received the mandatory life sentence. We have not produced any statistics relating to pleas to lesser included offenses, but we submit that the number, unquestionably, would be substantial and vastly in excess of the number who entered pleas to capital offenses. It has been estimated that ninety percent (90%) of all criminal convictions are by pleas of guilty. D. Newman, The Determination of Guilt or Innocence Without Trial 4 (1966).

North Carolina does not stand alone among the states upon which the devastating impact of retroactivity would fall. In ALFORD the Fourth Circuit also concluded that the State of New Jersey's non-vult procedure was also unconstitutional. (N.J.S.A. 2A:113-3, 4) and New Jersey would be faced with retrying all murder convictions upon non-vult pleas setting aside all capital convictions and all convictions upon lesser pleas when the accused was indicted for murder.

Although the State of New York has abolished the death penalty, New York will face a similar dilemma, since, upon a guilty plea, life imprisonment was imposed for murder under

former procedures. (N.Y. Code of Cr. Proc. Sec. 332.1). South Carolina now submits the question of punishment to a jury in every capital case, but retroactivity will also affect their former procedure. (S.C. Code Sec. 17-553.4).

We can also illustrate that the JACKSON-ALFORD defect exists in Louisiana (La. Code of Crim. Procedures, Art. 557), New Hampshire (N.H. Rev. Stat. Ann. 585:4, 5), Wyoming (Wyo. Stat. Ann. Sec. 6-59), and Texas (Vernon's Ann. Code Crim. Proc. of Texas, Art. 1.14). And, if these states assumed their various statutes were constitutional, what then can be said for the Federal Government which established a lengthy list of criminal statutes with JACKSON defects. The Federal statutes, containing JACKSON defects, commencing with the Federal Kidnaping Act (18 U.S.C. 1201(a)), includes 18 U.S.C. 1111 (murder), 21 U.S.C. 176b (sale of narcotics to minors), 42 U.S.C. 2274-76 (atomic secrets) and 18 U.S.C. 2113(e) (bank robbery). In addition, retroactivity will affect convictions under D. C. Code Ann. Sec. 22-2801 (rape). The impact upon these eight (8) states, North Carolina, New Jersey, New York, South Carolina, Louisiana, New Hampshire, Wyoming and Texas, and perhaps others which our research failed to discover—will be devastating indeed—as will be the impact upon the federal government in all cases of prosecution under the tainted statutes.

There is at present a heavy burden upon the administration of justice, in all courts across this land—and this state, and our sister states, cannot stand the devastating impact if retroactivity of these doctrines is to stand. Our courts are overcrowded. Our citizens are subjected to ever increasing violence. No court system can absorb the thousands of cases that affirmance of the ALFORD doctrine would create. Delays would increase, justice will creep, and respect for judicial procedures will be a mockery if, now, at retrials the various states will be forced to free infamous felons because the defense lawyer's best friend—delay—will have made evidence and wit-

nesses unavailable, and if available, witnesses will now have memories dimmed by the passage of time.

The evidence and witnesses were available for the original trials, often many years ago, and, because of the weight of the evidence available, the defendants pled guilty to the charges or lesser included offenses. We submit that the proper administration of justice compels a denial of retroactivity.

CONCLUSION

For the foregoing reasons we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

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CERTIFICATE

I, JACOB L. SAFRON, one of the Attorneys for the Appellant, hereby certify that on May 22, 1969, I served a typewritten final copy of the foregoing Brief on the Attorney of Record for the Appellee, Doris R. Bray, Esquiress, by handing and leaving with her personally, at Greensboro, North Carolina, a full typewritten copy of the foregoing Brief.

JACOB L. SAFRON
Staff Attorney

Sworn to and subscribed before me on
this the 26th day of May, 1969.

S/Alice C. Gorham
NOTARY PUBLIC

My Commission Expires May 20, 1970

FILE COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1969~~ 1971

No. ~~58~~ 14

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 50

STATE OF NORTH CAROLINA,

Appellant,

vs.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLEE

Questions Presented

I. IS THE NORTH CAROLINA STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY UNCONSTITUTIONAL UNDER THE DECISION OF *United States* v. *Jackson*, 390 U.S. 570 (1968)?

II. IS THE APPELLEE ENTITLED TO RELIEF UNDER THE DECISION OF *United States* v. *Jackson* EVEN THOUGH HE PLEADED GUILTY TO SECOND DEGREE MURDER RATHER THAN TO THE CAPITAL OFFENSE FOR WHICH HE WAS INDICTED?

III. Should the Decision of *United States* v. *Jackson* Be Given Retroactive Effect?

IV. Was the Appellee's Plea of Guilty Involuntary and Therefore Invalid?

Constitutional and Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 15-162.1 (repealed 1969) and 14-17 of the General Statutes of North Carolina are set out in the Appendix, p. 47.

Statement of the Case

In addition to those matters which are set out in the brief for the appellant under the heading "Statement of the Case," the following facts are material to the questions presented in this appeal.

At approximately one o'clock a.m. on November 23, 1963, Henry C. Alford was arrested in Winston-Salem, North Carolina, in connection with the death of Nathaniel Young, which had occurred the evening before. At the December

2, 1963, Term of Superior Court of Forsyth County, North Carolina, Alford was indicted for murder in the first degree, and Fred G. Crumpler of the Winston-Salem bar was appointed as his counsel by the court. On December 10, 1963 Alford pleaded guilty to second degree murder and was sentenced to the maximum sentence allowable for that offense, thirty years in the North Carolina State Prison.

According to the testimony of the investigating officer at Alford's trial, Alford, who is a Negro, and his white female companion had been in the home of Young, also a Negro, shortly before the murder. Alford, Young, and a third Negro man had a disagreement about whether Alford's female companion would leave with him or remain at the house. Alford grabbed the woman's coat and left, pursued by the other two men, who returned shortly thereafter. Ten or fifteen minutes later, there was a knock on the door, and, when Young opened the door slightly, he was shot. No one actually saw who fired the shot. The police apparently obtained statements from various persons who claim to have heard Alford make incriminating statements. They also located a gun in Alford's home, but investigation of the gun did not show that it had been fired recently.

On a number of occasions Alford and his attorney discussed what Alford's plea should be to the charge against him. The attorney testified at the state post-conviction hearing that he advised Alford that he had a right to plead not guilty and of the various verdicts which could be returned by the jury in that event. He further advised Alford that with the evidence that the state had, in his opinion he could not win the case and that he thought it would be in Alford's best interest to plead guilty to some offense of homicide rather than to stand trial on a first degree murder charge. The attorney told Alford that he

did not think the jury would look favorably upon the case because the facts were aggravated. The attorney also discussed the matter with Alford's sister and others, and they, too, advised him to plead guilty. According to the attorney's testimony, Alford told the attorney that he was not guilty, but at their last conference Alford told him that he would plead guilty to second degree murder. (Supplement to Record on Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 4, 8 and 14.)

At the trial, the attorney entered a plea of guilty to second degree murder. After the state and the defendant had presented witnesses, the defendant's attorney stated that the defendant wished to take the stand. Alford related his version of what happened on the night of the murder and then said:

> " . . . I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." (A. 7)

Alford's attorney then established by questioning Alford that he had advised Alford of his rights and of the possible results if he pleaded not guilty, and that Alford had authorized him to tender a plea of guilty. Alford then said:

> "Well, I'm still pleading that you all got me to plead guilty. I plead the oher way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty." (A. 8)

The court then asked Alford if it was still his desire to plead guilty to second degree murder, and Alford replied:

> "Yes sir, I plead guilty on—from the circumstances that he told me." (A. 9)

The court pursued this line of questioning no further.

During the State post-conviction hearing Alford reasserted his innocence, and his attorney at the original trial and Alford's sister testified to the effect that Alford has always contended that he was innocent but that he was pleading guilty because he did not want to risk the death penalty. (Supplement to Record and Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 8, 14 and 24; A. 39, 40, n. 21.)

ARGUMENT

I.

The North Carolina Statutory Scheme for Imposition of the Death Penalty Is Unconstitutional Under the Decision of United States v. Jackson, 390 U.S. 570 (1968).

In *United States* v. *Jackson,* 390 U.S. 570 (1968), this Court held that the death penalty clause in the Federal Kidnaping Act constitutes an "impermissible burden upon the assertion of a constitutional right." Under the Act, the punishment for kidnaping, if the kidnaped person has not been liberated unharmed, is imprisonment for a term of years or for life, or death if the jury shall so recommend. Thus, under the Act only the jury could impose the death penalty, and a defendant charged under the Act could avoid the possibility of capital punishment, by pleading guilty or by pleading not guilty and waiving his

right to a jury trial. This Court held in *Jackson* that a death penalty which is applicable only to those defendants who assert the right to contest their guilt before a jury discourages a defendant's assertion of his Fifth Amendment right not to plead guilty and deters his exercise of his Sixth Amendment right to demand a jury trial.

Under the North Carolina statutory scheme for imposition of the death penalty, the penalty for each capital crime is death unless the jury recommends that the punishment be imprisonment for life. (A. 47-48) If the defendant pleads guilty and his plea is accepted by the Court, the mandatory punishment is life imprisonment. The United States Court of Appeals for the Fourth Circuit correctly held in *Alford* v. *North Carolina,* 405 F.2d 340 (1968) (A. 27), that in all material respects the North Carolina statutory scheme (A. 47-48) is identical to that declared unconstitutional in *United States* v. *Jackson, supra,* and is, therefore, in violation of the Fourteenth Amendment right of due process, which includes the right to plead not guilty, *e.g., Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956), and the right of trial by jury. *Duncan* v. *Louisiana,* 391 U.S. 145 (1968).

The State of North Carolina has argued in its brief that the North Carolina statutory scheme is different from that condemned in *Jackson* because under the North Carolina statutes, the jury is given the right to mitigate the penalty for capital crimes, whereas under the Federal Kidnaping Act the jury is given authority to extend the penalty to include death. The State further argues that the two statutory schemes are distinguishable because their legislative histories are dissimilar, for the Federal Kidnaping Act originally contained no provision for capital punishment, whereas the North Carolina statute imposed the death

penalty automatically for capital crimes until 1949, when the alternative of life imprisonment was enacted

The constitutional infirmity of the penalty provisions of the Federal Kidnaping Act existed because of the effect which those provisions have upon a person charged under the Act. The effect of the North Carolina statutory scheme for imposition of the death penalty upon one accused of a capital crime is identical. In each instance, the defendant faces the awesome decision of whether to risk the possibility of the death penalty or to waive his right to have his guilt determined by a jury. Indeed, the North Carolina scheme is even more objectionable than that prescribed by the Federal Kidnaping Act, for in North Carolina the defendant in a capital case must risk the death penalty in order to assert his innocence at all since in North Carolina a defendant who pleads not guilty cannot waive his right to a jury trial and be tried by a judge. *State* v. *Muse,* 219 N.C. 226, 13 S.E.2d 229 (1941); *State* v. *Hill,* 209 N.C. 53, 182 S.E. 716 (1935). Thus, the North Carolina defendant, in order to avoid the possibility of capital punishment, must waive not only his right to a trial by jury, but also his right to a trial to determine his guilt and consequently his right to confront and cross-examine witnesses against him as established in *Pointer* v. *Texas,* 380 U.S. 400 (1965).

In his dissent in the case of *State* v. *Spence,* 274 N.C. 536, 545, 164 S.E.2d 593, 598 (1968), Justice Bobbitt of the North Carolina Supreme Court, in comparing the North Carolina statutory scheme for imposition of the death penalty with that of the Federal Kidnaping Act, noted: "If there by any real difference, it would seem that the pressure upon a defendant to enter a plea that will avoid 'the risk of death' would be greater under our statutes." *Id.* at 553, 164 S.E.2d at 603. Likewise, the Supreme Court of

South Carolina could find no distinction between its statutory scheme, which is virtually identical to that of North Carolina, and that declared unconstitutional in *United States* v. *Jackson*. *State* v. *Harper*, —— S.C. ——, 162 S.E.2d 712 (1968). It is submitted that since the effect of the North Carolina statutory scheme upon the accused is the same as that of the Federal Kidnaping Act, the intention of the North Carolina legislature in constructing that statutory scheme, no matter how charitable and well meaning, is irrelevant.

Nor is the semantic distinction which the State has attempted to make with regard to whether the jury's authority is to mitigate the penalty or to impose a more severe penalty significant. What is relevant and significant is that the statutory scheme for imposing the death penalty in North Carolina has a "chilling effect" upon the assertion by the accused on his rights not to plead guilty and to demand a jury trial under the Fourteenth Amendment and "needlessly encourages" him to plead guilty. *United States* v. *Jackson, supra,* 390 U.S. at 582 and 583. That such a scheme of punishment has the effect which this Court surmised that it has in its opinion in *Jackson* is vividly established by the record in the case now before this Court, which effectively demonstrates that the only reason for Alford's guilty plea was his fear that he might receive the death penalty if he allowed his guilt or innocence to be determined by a jury.

II.

The Appellee Is Entitled to Relief Under the Decision of United States v. Jackson Even Though He Pleaded Guilty to Second Degree Murder Rather Than to the Capital Offense for Which He Was Indicted.

The State has argued that the *Jackson* decision is not applicable to the case now before the Court because Alford pleaded guilty to second degree murder rather than to first degree murder, the capital crime for which he was indicted. Alford was never given the option of pleading not guilty to a lesser offense. His choice was either to plead not guilty to a capital offense or to plead guilty and avoid risking the death penalty. It is obvious from the record that the paramount factor in this decision was Alford's desire not to risk the possibility of capital punishment, not the prospect of being permitted to plead guilty to a lesser offense. Whether his sentence was life imprisonment, as it would have been had he pleaded guilty to first degree murder, or thirty years imprisonment, which he received for pleading guilty to second degree murder, could not have been significant to his decision. In rejecting this argument, the Fourth Circuit said:

> "It is immaterial in our view that petitioner pleaded guilty to murder in the second degree rather than to murder in the first degree under which he was charged. For all that appears in the record, the state had not surrendered its right to prosecute petitioner for first degree murder until the time when he agreed to plead guilty to second degree murder. Of course, if the state had determined that it would only prosecute for second degree murder, *and this fact had been known to*

> *the petitioner before his plea was entered,* then it could hardly be maintained that his guilty plea was a product of a fear of the death penalty. To us the *Jackson* defect in the North Carolina statutes potentially infects the validity of the acceptance of a plea of guilty to any lesser included offense. This is not to say, however, that where, as here, the plea is accepted to a lesser included offense, there is not a higher burden of proof upon one attacking the judgment entered thereon to show that the plea was the result of an invidious consideration than if the plea were to the degree of the crime which would support capital punishment. The very process of downgrading the charge may well suggest that the plea was motivated by factors other than a fear of death; certainly, it is circumstantial evidence that punishment by death was not a substantial possibility in view of the prosecutor's acquiescence in significant concessions. From a strictly evidentiary standpoint, we think this case is not the ordinary one and petitioner has met the burden of proof placed on him."
>
> 405 F.2d at 347 n. 17. (A. 37-38) (Emphasis the Court's.)

Chief Judge Haynsworth's primary concern in his dissent in *Alford* v. *North Carolina, supra,* was that the majority seemed to disapprove plea bargaining, which Judge Haynsworth considers "both useful and desirable in the administration of justice." 405 F.2d at 350. (A. 43) It is submitted that the record in the present case amply demonstrates that plea bargaining had no effect on Alford's decision to plead guilty. However, even if Alford was plea bargaining, it is submitted that such bargaining is impermissible under the reasoning of this Court in *Jackson.*

See *Shelton* v. *United States*, 242 F.2d 101 (5th Cir. 1957); *Shelton* v. *United States*, 246 F.2d 571 (5th Cir. 1957), rev'd, 356 U.S. 26 (1958). What *Jackson* requires is for the penalty for a single offense to be uniform, whether the defendant pleads guilty or not guilty and whether or not he waives his right to a jury trial. It is apparent that plea bargaining encourages a defendant to plead guilty and waive his right to a jury trial, and, thus, accomplishes the very result which was condemned as unconstitutional in *Jackson*.

In any event, plea bargaining should never be permitted where a defendant consistently proclaims his innocence and declares that he is submitting his guilty plea only to avoid a more severe penalty. "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an admittedly guilty defendant." *Bailey* v. *MacDougall*, 392 F.2d 155, 158 n. 7 (4th Cir. 1868). Alford has never been "admittedly guilty." In fact, he has consistently asserted his innocence and, indeed, at the trial itself denied any guilt. In the face of such denial, the trial judge made no real inquiry into the matter and did not attempt to ascertain from the defendant whether he was guilty. (A. 5-11) Alford's plea cannot be upheld on the ground that it was the result of plea bargaining.

III.

The Decision of United States v. Jackson Should Be Given Retroactive Effect.

Alford was tried and sentenced before this Court decided the *Jackson* case. The State has argued that *Jackson* should be declared by this Court to be prospective only in application and that Alford is, therefore, not entitled to relief. It is submitted, however, that the principles involved and the rights protected in the *Jackson* decision necessitate a conclusion that the decision must be given retroactive effect.

This Court's recent decisions that have significantly redefined the rights of the accused under the Constitution of the United States have necessitated a consideration of the problem of retroactivity. A reading of the cases considering the problem indicates that where the purpose of a decision is to require law enforcement officials to comply with the provisions of the Constitution or of federal law, the Court has held that the effect of the decision will be prospective only, for the result of violation of the rights involved in such decisions seldom raises a serious question as to the validity of the decision of guilt or innocence or deprives the accused of a fair trial. Where, however, the existence of the constitutional infirmity involved casts substantial doubt on the correctness of the determination of the accused's guilt or innocence or has effectively denied the accused a fair trial, the Court has held the decision to have retroactive application, considering these fundamentals—a fair trial and a reliable verdict—to outweigh all other relevant considerations.

Thus, a number of decisions involving actions of law enforcement officials before trial itself have been held to

be prospective only in application. In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court held that the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), making inadmissible at trial evidence obtained by unreasonable searches and seizures would be applied prospectively only. The Court's purpose in excluding such evidence was not that it was unreliable. On the contrary, such evidence would likely be as reliable as any other. Rather, the Court's aim was to force law enforcement officials to respect an accused's right to be free from unreasonable searches and seizures by assuring that no profit would be gained by violating such right. Likewise, in *Fuller* v. *Alaska*, 393 U.S. 80 (1968), the Court held prospective only the rule set out in *Lee* v. *Florida*, 392 U.S. 378 (1968), that evidence obtained in violation of Section 605 of the Federal Communications Act, 48 Stat. 1964, 1103, 47 USC §605, is not admissible at trial. And in *Desist* v. *United States*, 394 U.S. 244 (1969), the exclusionary rule announced in *Katz* v. *United States*, 389 U.S. 347 (1967), precluding from evidence the fruits of warrantless electronic eavesdropping was held to be nonretroactive. As in *Mapp* v. *Ohio, supra*, the purpose of the decisions in *Lee* and *Desist* was not to enhance the reliability of the determination of guilt or innocence but to force compliance with the law.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), this Court, in holding that *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), decisions concerned with the pretrial questioning process, would not be retroactively applicable, pointed out: "Our opinion in Miranda makes it clear that the prime purpose of these rulings is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice." *Id.* at 729. The Court was not

concerned with the reliability of the statements made by accused persons and admitted into evidence in pre-*Miranda* trials, pointing out that if a confession was in fact coerced, the accused is entitled to relief in any event.

Similarly, the right of counsel during pretrial confrontation of witnesses for identification purposes as expounded in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), has been held by this Court to be nonretroactive. *Stovall* v. *Denno,* 388 U.S. 293 (1967). The reasoning of the *Stovall* decision was substantially that expressed by the Court in *Johnson* v. *New Jersey, supra.* The accuracy of the identification and the fairness of the accused's trial are not substantially lessened by the absence of counsel during pretrial confrontation of witnesses, but counsel is a privilege which should be enforced under an adversary system of justice.

Recently, the Court has held the application of the Sixth Amendment right to a jury trial to the states through the Fourteenth Amendment to be prospective only. *De Stefano* v. *Woods,* 392 U.S. 631 (1968). The Court held that trials by judges rather than by juries are not necessarily unfair and that the reliance by law enforcement officials on the constitutionality of the former practice and the effect upon the administration of justice of the application of the new ruling to all trials in which a jury had not been permitted outweighed the possibility of some unreliability in verdicts in criminal contempt cases.

On the other hand, this Court has consistently held that where the "very integrity of the fact-finding process," *Linkletter* v. *Walker, supra,* 381 U.S. at 639, is challenged by the constitutional defect so that there exists "the clear danger of convicting the innocent," *Tehan* v. *United States*

ex rel. Shott, 382 U.S. 406, 416 (1966), and where violations of the constitutional right involved "almost invariably deny a fair trial," *Stovall* v. *Denno*, *supra*, 388 U.S. at 297, application of the constitutional principle enunciated will be retroactive.

Thus, the right of counsel at trial as established in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the requirement that indigent defendants who appeal be furnished transcripts by the state, the defendant's right of confrontation and cross-examination of witnesses as outlined in *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Barber* v. *Page*, 390 U.S. 719 (1968), the right to have coerced confessions excluded from consideration of the jury under *Jackson* v. *Denno*, 378 U.S. 368 (1964), the defendant's right to counsel on appeal, the right to counsel when an accused pleads guilty, the right to counsel at a hearing concerning revocation of probation and imposition of a deferred sentence, the right to have a co-defendant's inculpatory statements excluded from consideration of the jury, and the right of one accused of a capital crime not to have excluded from the jury all persons who have conscientious qualms against the death penalty have all been held to be retroactive in effect. See *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *Doughty* v. *Maxwell*, 376 U.S. 202 (1964) (right of counsel at trial); *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958), and *Brookhart* v. *Janis*, 384 U.S. 1 (1966) (confrontation and cross-examination per *Pointer* v. *Texas*, *supra*); *Berger* v. *California*, 393 U.S. 314 (1969) (confrontation and cross-examination per *Barber* v. *Page*, *supra*); *Nerlin* v. *Denno*, 378 U.S. 575 (1964) (coerced confessions); *Smith* v. *Arizona*, 389 U.S. 10 (1967), and *Anders* v. *California*, 386 U.S. 738 (1967) (right to counsel on appeal); *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968) (right to counsel when

guilty plea tendered); *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (right to counsel at revocation of probation hearing); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (exclusion of co-defendant's inculpatory statements); *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (nonexclusion of jurors with qualms against capital punishment). See generally, *Linkletter* v. *Walker*, *supra*, 381 U.S. at 628 n. 13.

In *Stovall* v. *Denno*, *supra*, 388 U.S. at 297, this Court set out the factors to be considered in making the determination of whether or not a decision has retroactive effect:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

The State has argued that this Court's decision in *United States* v. *Jackson*, *supra*, should not have retroactive effect because law enforcement authorities have relied upon the presumed constitutionality of the punishment scheme condemned in *Jackson* and because to hold the decision retroactive would mean a disruption of court calendars and the necessity for retrials in cases where evidence is no longer available.

This Court has said, however: "Foremost among these factors [those enunciated in *Stovall*] is the purpose to be served by the new constitutional rule." *Desist* v. *United States*, *supra*, 394 U.S. at 249. Where the purpose is to insure a fair trial and a reliable verdict, and where the violation of the constitutional right enunciated is likely to deny an accused a fair trial and cast serious doubt upon

the accuracy of the verdict, considerations of reliance by law enforcement authorities and the effect of retroactivity upon the administration of justice are given little weight. For example, it is difficult to imagine a greater impact on the administration of justice than was wrought by the retroactivity of *Gideon* v. *Wainwright, supra.* Nevertheless, this Court held that the right to counsel at trial is so necessary to the assurance of a fair trial that retroactive application could not be denied.

A statement of the factors to be considered make it evident that the holding of *United States* v. *Jackson, supra,* should be given retroactive effect. For the effect of encouraging an accused to plead guilty by offering him an alternative to the risk of the death penalty is not merely to deny him a fair trial, as in the *Gideon* situation, but to deny him a trial at all, for a plea of guilty is tantamount to conviction.[1] Under our system of justice, where the ultimate goal is to afford every man a fair trial, to allow a man to be pressured and psychologically coerced into foregoing his right to a trial is unconscionable.[2] Furthermore, when one considers the awesome decision with which a man who is charged with a capital crime in North Carolina is faced and the terrible gamble he must take in order

[1] "A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence." *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927).

[2] Under the Federal Kidnaping Act, an accused could also avoid the possibility of the death penalty by pleading not guilty and waiving a jury trial. Under the North Carolina statutes, that option is not available. The issue before the Court, therefore, is the retroactivity of *Jackson* to the extent a comparable statutory scheme forces the accused either to plead guilty or to risk capital punishment.

to have his guilt or innocence determined by a jury, it seems likely that, if he can avoid the gamble by pleading guilty, there is a strong possibility that he will plead guilty in order to preserve his life, despite his innocence, if the state has evidence which tends to incriminate him. Moreover, by yielding to the temptation of avoiding the possibility of the death penalty, the accused is forced to forfeit his right to confront and cross-examine his accusers, a right considered so fundamental by this Court that it has been given retroactive effect. *Brookhart* v. *Janis, supra; Berger* v. *California, supra.* The statement of this Court in *Witherspoon* v. *Illinois, supra,* 391 U.S. at 523 n. 22 is very apt to the situation now before the Court:

> "But we think it clear, Logan notwithstanding, that the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate, . . . and we have concluded that neither the reliance of law enforcement officials, . . . nor the impact of a retroactive holding on the administration of justice, . . . warrants decision against the fully retroactive application of the holding we announce today."

IV.

The Appellee's Plea of Guilty Was Involuntary and Was Therefore Invalid.

Even if this Court's decision in *United States* v. *Jackson, supra,* is not given fully retroactive effect, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed because Alford's plea of guilty was involuntary. It is well settled that a plea of guilty which is not entirely voluntary is void. *E.g., Machibroda* v. *United States,* 368 U.S. 487 (1962); *Shelton* v. *United States,* 356 U.S. 26 (1958); *Pennsylvania ex rel. Herman* v. *Claudy,* 350 U.S. 116 (1956); *Von Moltke* v. *Gillies,* 332 U.S. 708 (1948); *Waley* v. *Johnston,* 316 U.S. 101 (1942); *Walker* v. *Johnston,* 312 U.S. 275 (1941).

Even where this Court has refused to give newly enunciated constitutional rights retroactive effect, it has recognized that in cases where the facts show a fundamental violation of due process, a defendant is nevertheless entitled to relief. In *Stovall* v. *Denno, supra,* in which this Court declared that the right of counsel at pretrial confrontations with witnesses for identification purposes would be prospective only, the Court discussed the question of retroactivity as follows:

> "Therefore, while we feel that the exclusionary rules set forth in Wade and Gilbert are justified by the need to assure the integrity and reliability of our system of justice, they undoubtedly will affect cases in which no unfairness will be present. Of course, we should also assume there have been injustices in the past

> which could have been averted by having counsel present at the confrontation for identification, just as there are injustices when counsel is absent at trial. But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application, especially in light of the strong countervailing interests outlined below, and because *it remains open to all persons to allege and prove, as Stovall attempts to do in this case, that the confrontation resulted in such unfairness that it infringed his right to due process of law.* See Palmer v. Peyton, 359 F.2d 199 (CA 4th Cir. 1966)." 388 U.S. at 299. (Emphasis added.)

In *Davis* v. *North Carolina,* 384 U.S. 737 (1966), decided on the same day that *Johnson* v. *New Jersey, supra,* held *Escobedo* v. *Illinois, supra,* and *Miranda* v. *Arizona, supra,* to have nonretroactive application, the Court held that the petitioner Davis' confession was involuntary and that the absence of the warnings required by *Miranda* was "a significant factor in considering the voluntariness of statements later made." *Id.* at 740. This Court further stated that it had a duty "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Id.* at 741-42.

A reading of the record in the case now before this Court leads to the inescapable conclusion that Alford's plea of guilty was in fact involuntary. The United States Court of Appeals for the Fourth Circuit so found:

"While *Jackson* clearly stands for the proposition that the death penalty provisions of North Carolina constitute an invalid burden upon the right to a jury trial and the right not to plead guilty, it falls short of holding that the North Carolina statutory provisions for the imposition of capital punishment are in themselves inherently coercive. In *Jackson* the Court stated that the mere fact that an accused had pleaded guilty to a charge under the Federal Kidnaping Act did not necessarily render his plea involuntary and require reversal of his conviction.

"By a parity of reasoning, we think that a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law. *Jackson* by defining what are the impermissible burdens of a statutory scheme like that of North Carolina must be read, however, to hold that a prisoner is entitled to relief if he can demonstrate that his plea was a product of those burdens—specifically, that his principal motivation to plead guilty or to forego a trial by jury was to avoid the death penalty. *Jackson* thus defined a new factor to be given weight in determining the voluntariness of a plea—a factor present in full measure in the instant case because of the North Carolina statutory scheme. As we read *Jackson,* we must determine the extent to which, if at all, petitioner was moved to plead guilty because of the incentive which the North Carolina statutory scheme supplied to achieve that result.

"In light of the principles we distill from *Jackson,* we have no hesitancy in concluding from our examination of the record that petitioner's plea of guilty was

made involuntarily, and that petitioner is entitled to relief by habeas corpus."

Alford v. *North Carolina, supra,* 405 F.2d at 346-47. (A. 36-38) (Footnotes and roman numerals omitted.)

The Fourth Circuit thus held, in accordance with this Court's decision in *Davis* v. *North Carolina, supra,* that newly enunciated constitutional principles may be considered as relevant factors in determining whether a plea of guilty was in fact involuntary.

The record in the present case overwhelmingly establishes that Alford's only reason for pleading guilty was to avoid risking the possibility of the death penalty. At the trial itself, Alford took the stand at his own request and, after relating his version of what had happened on the night of the murder, said:

"... I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all." (A. 7)

After Alford testified, in response to questioning by his attorney, that he had authorized the plea, he reiterated:

"Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty." (A. 8)

And when the court asked Alford if it was still his desire to plead guilty, he replied:

> "Yes sir, I plead guilty on—from the circumstances that he told me." (A. 9)

According to the testimony presented at the state post-conviction hearing, Alford consistently asserted his innocence prior to his trial and agreed to plead guilty with great hesitancy and only after his attorney had informed him that in his (the attorney's) opinion Alford would receive the death penalty if he pleaded not guilty and was tried before a jury, and only after his sister and other friends urged him to plead guilty because pleading guilty would be better than risking the death penalty. (Supplement to Record on Appeal, C.A. 4, No. 10,391, p. 26½, Proceedings of Post Conviction Hearing, pp. 8, 14 & 24; A. 39, 40, n. 21)

Furthermore, as the Fourth Circuit noted, "No court has ever found that he [Alford] pleaded guilty other than to avoid possible imposition of the death penalty." 405 F.2d at 348. (A. 38) Judge Haynsworth in his 1966 memorandum decision dismissing an earlier petition filed by Alford, said:

> "The state judge found that Alford decided to plead guilty because he had no defense to the State's case against him for first degree murder and because the guilty plea allowed him to escape the possibility of the death sentence. There is ample evidence to support this finding of fact and I see no reason to disagree with it." (A. 20)

Nothing in the record suggests that Alford has ever deviated from his repeated assertions of his innocence or from his contention that his only reason for pleading guilty was to avoid the possibility of the capital punishment.

In *United States* v. *Jackson*, this Court held the scheme of punishment of the Federal Kidnaping Act unconstitutional because of the possibility of its coercive effect and not because all pleas of guilty entered thereunder are necessarily coerced and involuntary. And it is perhaps arguable that persons entering pre-*Jackson* guilty pleas which were not so coerced are not entitled to relief. Surely, however, any defendant who can demonstrate that his plea of guilty was in fact the sole result of the coercive effect of the statutory scheme of punishment under which he was charged is entitled to relief, for his guilty plea was in fact involuntary. It is difficult to imagine a more obvious case for relief than the case now before this Court.

Conclusion

For the foregoing reasons the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed and the case remanded for issuance of the writ of habeas corpus.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~50~~ 14

STATE OF NORTH CAROLINA,

Appellant,

—v.—

HENRY C. ALFORD,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 268

CHARLES LEE PARKER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF ALBERT BOBBY CHILDS, MARIE HILL AND ROBERT LEWIS ROSEBORO

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Movants, Albert Bobby Childs, Marie Hill and Robert Lewis Roseboro respectfully move the Court for permission to file a Brief *Amici Curiae*. The reasons assigned for the filing of the Brief *Amici Curiae* are contained in the Statement of Interest of the *Amici* in the Brief *Amici Curiae*.

The appellee in State of *North Carolina* v. *Alford* and petitioner in *Parker* v. *State of North Carolina* have consented to the filing of a brief *amici curiae*. The present motion is necessitated because attorneys for the State of North Carolina, appellant in *North Carolina* v. *Alford* and respondent in *Parker* v. *North Carolina*, have indicated that they would consent to the filing of the Brief *Amici Curiae* only for *amicus* Albert Bobby Childs, as the cases of *amici* Marie Hill and Robert Lewis Roseboro are still pending on appeal in the Supreme Court of North Carolina.

WHEREFORE, movants pray that the Brief Amici Curiae be permitted to be filed with the Court.

Respectfully submitted,

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Statement of Interest of the *Amici*

Amici Albert Bobby Childs,[1] Marie Hill,[2] and Robert Lewis Roseboro[3] are North Carolina prisoners under sentences of death. When charged with a capital crime, each was given by North Carolina statutory practice the choice of pleading guilty, thereby assuring a sentence of life imprisonment, or of risking the death penalty after jury trial upon a plea of not guilty. Each pleaded not guilty and, upon conviction, was sentenced to die.

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[1] Albert Bobby Childs is a 46 year old Negro man. Charged with the crimes of rape and burglary, he pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Buncombe County in November, 1965. His conviction and sentences of death were affirmed on appeal, *State* v. *Childs*, 269 N. C. 307, 152 S. E. 2d 453 (1967). In June, 1967, he filed a petition for a post-conviction hearing in the Superior Court. He raised an issue under *United States* v. *Jackson, infra*, which the Superior Court resolved by ruling that *Jackson* was inapplicable and that his death sentence was constitutional. The Court of Appeals of North Carolina refused to review the Superior Court on certiorari and Childs thereafter filed a petition for certiorari in this Court which is now pending. *Childs* v. *North Carolina*, O. T. 1969, No. 25 Misc.

[2] Marie Hill is a 17 year old Negro girl. Charged with the crime of murder, she pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Edgecombe County in December, 1968. She now has an appeal pending in the Supreme Court of North Carolina wherein she urges that her death sentence is void as a penalty on the exercise of her constitutional rights. *State* v. *Hill*, No. 2, Fall Term, 1969.

[3] Robert Lewis Roseboro is a 16 year old Negro boy. Charged with the crime of murder, he pleaded not guilty, was convicted and sentenced to death by a jury in the Superior Court of Cleveland County in May, 1969. In his pending appeal in the Supreme Court of North Carolina, he urges the unconstitutionality of his sentence of death on grounds identical to those asserted by Marie Hill. *State* v. *Roseboro*, No. _____ Fall Term, 1969.

Each is now challenging the death sentence imposed upon him as a penalty attached to the exercise of his constitutional rights to plead not guilty and to be tried by a jury, invoking *United States* v. *Jackson,* 390 U. S. 570 (1968). The United States Court of Appeals for the Fourth Circuit has vindicated this constitutional contention in *Alford* v. *North Carolina,* No. 50, by holding that the capital punishment provisions of North Carolina law are indeed unconstitutional by force of *Jackson.* The State bases its appeal to this Court upon the proposition—not necessary to decision of the case below or here, but nevertheless strongly urged in North Carolina's jurisdictional statement and brief—that the Fourth Circuit erred in this constitutional decision, which would have the effect that *amici's* death sentences could not be carried out.[4] *Amici,* therefore,

[4] *Amici*'s position is that the death sentences imposed upon them, under a procedure that taxed their constitutional rights to defend with the penalty of death, are unconstitutional. In that regard, they urge that the Supreme Court of North Carolina was plainly wrong when it held in *State* v. *Atkinson,* —— N. C. ——, 167 S. E. 2d 241 (1969) that the effect of a declaration of the unconstitutionality of the North Carolina capital statutory scheme under *Jackson* would be to eliminate the provision whereby capital defendants could save their lives by pleading guilty, rather than to invalidate death sentences imposed upon defendants who entered not guilty pleas. This is so because, by whatever state-law "separability" doctrines North Carolina seeks to correct the constitutional vice of its statutory scheme for the future, no notion of "separability" can change the unconstitutional choices offered by that scheme in the past. Guilty pleas at the time amici were required to plead were lawful and were regularly being accepted by the courts of North Carolina. There was then no legal impediment to amici's proffering guilty pleas which, upon acceptance by the court, would have assured them immunity from the death penalty. Nothing which the State of North Carolina may announce *ex post facto* can effect in any way this statutory pattern that confronted amici when on trial for their lives. No ruling now can unwrite the statutes that then confronted them, disestablish the options unconstitutionally presented for their choice, unmake the

have a life-or-death interest in the appeal, since any decision that would reverse the Fourth Circuit by holding *Jackson* inapplicable in North Carolina would thereby destroy the promise of life which *Alford* has held out to them.

Statement

These two cases present a common question for decision: in what circumstances a guilty plea to a capital charge must be set aside on the ground that it is "involuntary," improperly coerced by the threat of the death penalty if the defendant elects to plead not guilty and is convicted. In *North Carolina* v. *Alford*, No. 50, the Court of Appeals for the Fourth Circuit found as a fact that the defendant's

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choice they made, or diminish the significance of that choice. All that any court can do at this point in time is to relieve persons condemned under this scheme from the unconstitutional consequence of the unconstitutional procedure under which they were sentenced to death—that is, the death sentence. See the petition for writ of certiorari in *Forcella and Funicello* v. *New Jersey*, O. T. 1969, No. 18 Misc., pp. 35-37.

We add that it seems plain to us, *contra* the reasoning in *State* v. *Atkinson, supra*, that *amici* have standing to claim the benefits of *Jackson*. A plainer instance of standing, indeed, could hardly be imagined: amici are challenging sentences of death imposed upon them under an unconstitutional statute as penalties for the exercise of constitutional rights. That they resisted the pressure of threatened death and exercised their constitutional rights at the jeopardy of their lives is hardly a ground for denying them standing to complain when their lives are taken in consequence. See *State* v. *Atkinson, supra*, 167 S. E. 2d, at 259-260. If this proposition was at all debatable prior to this Court's decision in *North Carolina* v. *Pearce*, —— U. S. ——, 23 L. Ed. 2d 656 (1969), it is no longer. See *Pope* v. *United States*, 392 U. S. 651 (1968) (per curiam); Petition for Writ of Certiorari in *Childs* v. *North Carolina*, O. T. 1969, No. 25 Misc., pp. 23-25; Petition for Writ of Certiorari in *Forcella and Funicello* v. *New Jersey*, *supra*, pp. 29-35.

plea was involuntary, the undisputed evidence showing that "he pleaded guilty . . . to avoid possible imposition of the death penalty," 405 F. 2d 340, 348 (4th Cir. 1968). In *Parker* v. *North Carolina,* No. 268, the Court of Appeals of North Carolina affirmed the denial of a petition for post-conviction relief which contended that the defendant had been coerced into pleading guilty by the threat of the death penalty.

The defendants[5] in each of these cases rely heavily on *United States* v. *Jackson,* 390 U. S. 570 (1968), and *Pope* v. *United States,* 392 U. S. 651 (1968) (per curiam), in which this Court invalidated the death penalty provisions of the Federal Kidnaping Act and the Federal Bank Robbery Act respectively. Those statutes were invalidated because, by allowing a defendant who pleaded guilty (or waived jury trial) to escape the risk of the death penalty, they "needlessly encourage[d]" (390 U. S., at 583) waiver of the constitutional rights to plead not guilty and have a jury trial. The Court of Appeals in *Alford* began its constitutional analysis with a determination that North Carolina's death penalty statutes—which like the federal statutes in *Jackson* allowed avoidance of any risk of the death penalty by a plea of guilty—were unconstitutional. North Carolina has vigorously challenged that conclusion in this Court. Its position that *Jackson* does not invalidate the North Carolina capital sentencing scheme has been sustained not only by the State's Court of Appeals in *Parker,* but also by the North Carolina Supreme Court in *State* v. *Peele,* 274 N. C. 106, 161 S. E. 2d 568 (1968); *State* v.

[5] We use the term "defendant" throughout to refer to the defendant in the original criminal proceeding—the appellee in *Alford* and the petitioner in *Parker.*

Spence, 274 N. C. 536, 164 S. E. 2d 593 (1968); *State* v. *Atkinson,* —— N. C. ——, 167 S. E. 2d 241 (1969).

It bears noting that the constitutionality of the North Carolina death penalty statutes is not necessarily involved here; the ultimate question presented is simply whether the guilty pleas of Alford and Parker were "voluntary." A plea may obviously be involuntary even though the statutory setting in which it was entered is constitutional; conversely, it is perfectly possible that a defendant might, for reasons having nothing to do with a desire to avoid the death penalty, enter a voluntary plea in a jurisdiction in which the death penalty statutes suffer from a *Jackson*-like infirmity. However, the fact is that the North Carolina statutes *are* unconstitutional under *Jackson,* and that circumstance plays a critical part in our analysis of these cases. For that reason—and because *amici's* lives may literally depend upon the recognition that the death penalty statutes of North Carolina are unconstitutional—we discuss the constitutionality of those statutes in Part I. In Part II, we consider the specific question presented in these cases—namely, whether the defendant who has pleaded guilty in a capital case may have that plea set aside if it can be shown that the plea was motivated by fear that the death penalty would be imposed if he stood trial.

Summary of Argument

The death penalty provisions of North Carolina law are unconstitutional under *United States* v. *Jackson,* 390 U. S. 570 (1968), because only a defendant who pleads not guilty may be sentenced to die. Such a scheme needlessly encourages guilty pleas and penalizes those choosing to ex-

ercise their constitutional rights to deny and contest guilt. This conclusion is not disturbed because defendants do not have an absolute right to plead guilty under North Carolina practice for neither did defendants under the federal procedure invalidated in *Jackson*. No more pertinent is the fact that in North Carolina—unlike the federal procedure before the Court in *Jackson*—a defendant cannot *also* avoid the death penalty by waiving jury trial on a plea of not guilty. *Jackson* condemned undue pressures upon Fifth as well as Sixth Amendment rights; and a statutory scheme which informs a defendant that to escape all risk of death he must plead guilty, thereby waiving *both* his right to defend and his incidental right to jury trial, is more, not less, obnoxious to the Constitution than the practice that *Jackson* invalidated.

The Constitution requires that a guilty plea must be "voluntary" to be valid. Under this principle, certain kinds of pressures and inducements to plead guilty are deemed so inherently coercive as to be impermissible as a matter of law. The threat of execution, suspended if a guilty plea is interposed, is such an inducement. Where by statute the state offers those entering a plea of guilty immunity from the death penalty, pleas entered under the statute are suspect and must be set aside unless (1) it affirmatively appears from the record of the original proceedings that the plea was motivated by permissible considerations (*Boykin* v. *Alabama*, —— U. S. ——, 23 L. Ed. 2d 274 (1969)); or, alternatively, (2) the plea is determined to have been motivated by considerations other than threat of the death penalty at a proper evidentiary hearing at which the burden of proof is imposed upon the State.

ARGUMENT

I.

A Statutory Scheme Which Subjects to the Risk of the Death Penalty Only Those Defendants Who Elect to Stand Trial on the Issue of Guilt, and Which Forbids the Imposition of Death Upon Those Defendants Who Waive Their Constitutional Rights to Deny and Contest Guilt, Is Unconstitutional.

A complete description of the North Carolina statutory scheme at issue here is set out in the petition for a writ of certiorari filed in *Childs* v. *North Carolina,* O. T. 1969, No. 25 Misc., at pp. 16-17. It will suffice to say that in North Carolina, a defendant who pleads not guilty to a capital charge may be sentenced to death in the discretion of the jury upon conviction. In contrast, the defendant who waives the right to trial and pleads guilty—with the approval of the court and prosecution—wholly avoids the death penalty, and the punishment is automatically fixed at life imprisonment. N. C. Gen. Stat. §15-162.1.

As in *Jackson,* defendants may thus avoid the death penalty in a capital case by waiving the constitutional right to deny and contest guilt—and with it all of the constitutionally guaranteed procedural protections subsumed within the right to trial. In *Jackson,* this Court was confronted with a comparable legislative scheme, under which the defendant could avoid the legislatively authorized death penalty by waiving either or both of two constitutional rights: (1) the Fifth Amendment right not to plead guilty, to deny and contest guilt; and (2) the Sixth Amendment right to a trial by jury. This scheme was held unconstitutional:

"The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnaping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.

"The Government suggests that, because the Act thus operates 'to mitigate the severity of punishment,' it is irrelevant that it 'may have the incidental effect of inducing defendants not to contest in full measure.' We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California*, 380 U. S. 609." (*Id.* at 581-83.)

There may be identified four arguments which have been advanced in various quarters by those seeking to distinguish and avoid *United States* v. *Jackson* as respects death penalty provisions like North Carolina's.[6] The fountainhead of these arguments is the opinion of the New Jersey Supreme Court in *State* v. *Forcella,* 52 N. J. 263, 245 A. 2d 181 (1968), whose extremely restrictive interpretation of *Jackson* is presently pending for review here on a petition for certiorari *sub nom. Forcella and Funicello* v. *New Jersey,* O. T. 1969, No. 18 Misc.

(1) It is argued that the challenged provisions are "primarily for the benefit of a defendant" (*State* v. *Peele,* 274 N. C. 106, 161 S. E. 2d 568, 572 (1968); see also Brief for Appellant, *North Carolina* v. *Alford,* No. 50, at p. 8), and are designed to operate "to the benefit of defendants as a group. The purpose is humane, and so is its overall impact." *State* v. *Forcella,* 52 N. J. 263, 280, 245 A. 2d 181, 190 (1968).

(2) Defendants in North Carolina do not have an absolute right to plead not guilty and thereby avoid the possible imposition of the death penalty. As in New Jersey, a plea that would escape the death penalty may be accepted only by leave of the prosecution and the court. This, the New Jersey Supreme Court thought, distinguishes state practice from the federal where (again, as that court viewed it) a capital defendant "has a 'right,' in a realistic sense, to plead guilty." *Id.* 52 N. J., at 279. See also *State* v. *Peele, supra,* 161 S. E. 2d, at 572 ("The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it.").

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[6] See note 9, *infra.*

(3) The New Jersey Supreme Court also argued that, *because* under the New Jersey-North Carolina procedure, a waiver *only* of the right to a jury trial (by pleading not guilty and submitting to court trial) is not possible, the Sixth Amendment is not burdened by the death penalty. Only the Fifth Amendment right not to plead guilty and to deny and contest guilt is taxed with the risk of a death sentence. *State* v. *Forcella, supra,* 52 N. J., at 271-275. Although recognizing that this Court's opinion in *Jackson* plainly referred to an infringement of both the Fifth and Sixth Amendments, the New Jersey Supreme Court concluded that "the two propositions were . . . intertwined, thus suggesting that not all members of the majority were ready to say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment." *Id.,* 52 N. J. at 272. *Jackson* is thus reducible, the court said, to a determination that "the federal statute obviously ran afoul of the Sixth Amendment." *Id.,* 52 N. J., at 272.

(4) The North Carolina Supreme Court's opinion in *State* v. *Peele, supra,* urges that under the Federal Kidnaping Act, "the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty." 161 S. E. 2d, at 572. This is supposedly to be construed with the North Carolina statute which, as the court viewed it, "provides that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty . . . fixes the punishment at life imprisonment." *Id.*

We turn to an examination of each of these four arguments against the application of *Jackson.*

(1) *The Benevolent Intent of the Legislature.* It is not necessary to question the conclusion of the North Carolina Supreme Court that the statutory scheme which permits a defendant to avoid the death penalty by pleading guilty was conceived for the benefit of defendants generally. Nor do we doubt the statement of the New Jersey Supreme Court that the similar provisions of that State's law were intended as a humane procedural device. But this Court's analysis in *Jackson* began with a recognition that the same might be said of the procedure imposed by the Federal Kidnaping Act, whose sentencing provisions "may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." 390 U. S. at 582. The Court's rejection of the legislative motive as a basis for upholding these procedures was nonetheless unequivocal:

> "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. Cf. *United States* v. *Robel,* 389 U. S. 258; *Shelton* v. *Tucker,* 364 U. S. 479, 488-89. The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case, the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing these defendants who plead not guilty and demand jury trial. . . . Congress cannot impose such a penalty in a manner

that needlessly penalizes the assertion of a constitutional right. See *Griffin* v. *California,* 380 U. S. 609." (*Id.,* at 582-83.)

Jackson, then, squarely holds that the humanitarian motives of the legislature do not save a statutory scheme which operates to penalize "defendants who plead not guilty and demand jury trial." *Id.*

(2) *The Plea of Guilty Can Only Be Made With the Consent of the Court.*

The North Carolina and New Jersey practice, in theory at least,[7] confers upon the trial judge the power to reject the defendant's plea, thus forcing him to stand trial for his life. This, it is said, distinguishes those statutory procedures from the federal practice condemned in *Jackson.* That conclusion supposes what is not in fact the case, for under federal practice it is clear that the consent of the trial judge (and, for that matter, the prosecutor) is required for *either* a guilty plea or a jury waiver in a Kidnaping Act case. See *United States* v. *Jackson, supra,* at 584; *Singer* v. *United States,* 380 U. S. 24 (1965); *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962); see also *United States* v. *Cox,* 342 F. 2d 167, 190-193 (5th Cir. 1965) (Wisdom, *J.,* concurring).

The point, of course, is that the judge's power to reject the defendant's life-assuring plea and its incidental waiver

[7] The opinion of Justice Jacobs and Hall, dissenting in *State* v. *Forcella, supra,* 52 N. J. at 294, tells us what the majority of the court in that case neither affirms nor denies—namely, that the theoretical power of New Jersey trial judges to reject a proffered *non vult* plea is "seldom exercised where the prosecutor has recommended its acceptance."

of federal rights is simply irrelevant. Even if North Carolina and New Jersey trial judges may and occasionally do reject the plea, the defendant is still encouraged to attempt or offer to plead guilty on the hope that his plea will be accepted and his salvation thus secured. On the one hand, "the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty . . ." (*United States* v. *Jackson,* 390 U. S. at 573, n. 6); on the other, he "completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision" (*id.*) to subject him to it by rejecting his offer to plead guilty. As *Jackson* makes unmistakably clear, this differential risk of capital punishment is unconstitutional.

(3) *The Waiver of Jury Trial Alone Does Not Avoid the Possible Imposition of the Death Penalty.* In North Carolina and New Jersey, the defendant who pleads not guilty to a capital crime cannot avoid the possible imposition of the death penalty by waiving his right to a jury trial, as could a defendant pleading not guilty under the Federal Kidnaping Act. The New Jersey Supreme Court thought this enough to distinguish *Jackson* even though North Carolina and New Jersey defendants could avoid any possibility of the death penalty—as could federal defendants under the Kidnaping Act—by entering a plea of guilty. *State* v. *Forcella, supra,* at 269-270. This narrow view of *Jackson* has not, to our knowledge, found acceptance in any other court. It is inconsistent with the decision of the South Carolina Supreme Court in *State* v. *Harper,* 162 S. E. 2d 712 (1968),[8] and, of course, with that of the Fourth

[8] The South Carolina Supreme Court found that the statutory provisions challenged in *Harper* allowed a defendant to escape the

Circuit in *Alford*. If the distinction taken by the New Jersey Court prevails, it will deprive *Jackson* of all meaning with respect to the capital sentencing practices of the states.[9] But it cannot prevail without distortion of the principles discussed in *Jackson* and of the constitutional values on which that decision rests.

To begin with, the premise of the New Jersey Supreme Court that only the Fifth Amendment right to deny and contest guilt, and not the Sixth Amendment right to jury trial, is involved is simply incorrect. By pleading guilty—the only method in North Carolina and New Jersey by

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risk of the death penalty by pleading guilty with the approval of the trial court. On a not guilty plea, a jury might impose capital punishment. The question of waiver of jury trial on the plea of not guilty was not involved. This scheme, the Court held, was condemned by *Jackson;* and it resolved the constitutional dilemma by voiding the provision which excluded the death penalty on a guilty plea. *Harper* arose, as did *Jackson,* on a pretrial motion; thus, the South Carolina court was not required to decide the implications of its holding for condemned men who, like *amici,* pleaded not guilty and were sentenced to death during the period when they might still have escaped that sentence by a guilty plea.

[9] Our research has disclosed no States in which the defendant may avoid the death penalty by waiving his right to a jury trial and accepting court trial on a not guilty plea. There are to our knowledge seven states in which a capital defendant may avoid the death penalty by pleading guilty: they are (1) Louisiana (La. Code of Crim. Proc. Art. 557); (2) Mississippi (Miss. Code §§2217, 2536; see *Bullock* v. *Harpole,* 102 So. 2d 687 (1958)); (3) New Jersey (N. J. S. A. §§2A:113-3, 113-4); (4) New York (N. Y. Code of Crim. Proc. §3321); (5) North Carolina (N. C. Gen. Stat. §15-162.1); (6) South Carolina (S. C. Code §17-553.4 (1967) Cum. Supp.); and (7) Wyoming (Wyo. Stat. §7-195) (kidnaping). See also N. H. Rev. Stat. Ann. §§585.4, 585.5. We are unsure of the law in the states of Nebraska, see Neb. Rev. Stat. §28-417 (kidnaping); Washington, see Rev. Code of Wash., Title 9, §9.52.010 (kidnaping); and Texas, see Vernon's Ann. Code of Crim. Proc. of Texas, Art. 1.14, as amended, Tex. Acts 1967, p. 1733, ch. 659, §1, effective August 28, 1967.

which the defendant can avoid all risk of the death penalty —the defendant waives *all* procedural protections which the Constitution affords defendants in a criminal trial (*McCarthy* v. *United States,* 394 U. S. 459 (1969)), among them the right to trial by jury. This point was recently emphasized by the Court in *Boykin* v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274, 279 (1969):

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan,* 378 U. S. 1. Second is the right to trial by jury. *Duncan* v. *Louisiana,* 391 U. S. 145. Third, is the right to confront one's accusers. *Pointer* v. *Texas,* 380 U. S. 400."

Second, the North Carolina and New Jersey procedures are, if anything, *more* destructive of constitutional rights than that condemned in *Jackson.* For the federal defendant could avoid the death penalty by waiving only his Sixth Amendment right to jury trial. He might thereby save his life and yet have *some* trial—before a judge—at which he could exercise his Fifth Amendment right to contest guilt. North Carolina and New Jersey offer no such middle ground; their price for avoiding the death penalty is a waiver of the right to deny and contest guilt, and thus of *all* procedural protections (including jury trial) subsumed within that right.

But even if it could be said that the right to jury trial is not infringed when the whole of the right to deny and contest guilt is impaired, we submit that there is no basis for concluding that the rule of *Jackson* does not apply

whenever a State encourages a waiver of the Fifth Amendment right not to plead guilty by taxing a not guilty plea with the risk of a death sentence. The Court's careful opinion in *Jackson* relies upon the Fifth Amendment equally with the Sixth Amendment, and the very logic of the *Jackson* decision forbids any distinction between Sixth and Fifth Amendment rights in a fashion which disparages the latter. Palpably, any holding that a procedure which permits avoidance of the death penalty by waiver of the right not to plead guilty is constitutional, although a comparable procedure involving only waiver of the right to jury trial is not, would misconceive the relative importance of the two federal constitutional rights involved in *Jackson.*

The right not to plead guilty, and the correlative right to a hearing at which guilt may be contested, is of the very essence of due process of law. Whatever view one may hold of the Fourteenth Amendment, and of the degree to which it makes applicable to the States the various substantive provisions of the Bill of Rights, there has never been any doubt that an opportunity to a hearing at which to contest guilt is a constitutional essential.

In contrast, it was not until last year that this Court finally declared that the right to a trial by jury in a criminal case was among those rights deemed so essential to civilized jurisprudence that it must be made applicable to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Bloom* v. *Illinois,* 391 U. S. 194 (1968). But the Court also held that the rule of these cases would not be retroactively applied (*De Stefano* v. *Woods,* 392 U. S. 631 (1968)), a ruling which emphasized that, however desirable the right to jury trial, in general, a fair adjudication of guilt could occur without a jury.

Quoting from *Duncan* in *De Stefano,* the Court said: "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury." 392 U. S. at 633-634.

One can therefore fairly conclude only that the suggested distinction of *Jackson* reflects either a convoluted appreciation of the relative importance of the rights given by the Fifth and Sixth Amendments or a perverse unwillingness to comply with an unwelcome decision of this Court. As the dissenting judges in *Forcella* wrote: "In the field of federal constitutional law, the decisions of the United States Supreme Court are of course binding upon all state courts. Our clear responsibility is to apply those decisions with due regard for their tenor, principles and goals in analogous situations with the aim of determining a matter as we conscientiously believe that Court would if the case were before it." *Id.,* 52 N. J. 294-295.[10]

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[10] The New Jersey Supreme Court, in rejecting Forcella's contentions, allowed that a contrary ruling would of necessity result in the invalidation of "plea bargaining." *Id.* 52 N. J., at 275-276. The argument, while manifestly uncompelling, is at least familiar; the Government's submission in *Jackson* included the identical point. Brief for the United States, *United States* v. *Jackson,* O. T. 1967, No. 85, pp. 6-7. The argument, we think, is obviously one which manifests disagreement with the *Jackson* holding, not distinction of it.

In any event, the issue of the constitutionality of plea bargaining in general is no more presented here than in *Jackson* or in *Pope* v. *United States,* 392 U. S. 651 (1968). We therefore see no need to labor the obvious point that a procedure which assures a life sentence to the defendant who waives his rights and pleads guilty, while it threatens with death the defendant who dares to exercise those rights, is an entirely different animal from the time-honored practice of plea bargaining in non-capital cases. Whatever the reach of the evolving doctrine forbidding the imposition of a penalty on the exercise of constitutionally guaranteed rights, surely that doctrine forbids what North Carolina and New

The controlling point is simply that, with regard to both the Fifth and Sixth Amendments, the North Carolina and New Jersey practices are functionally identical to the federal procedure which this Court held violative of the Constitution in *United States* v. *Jackson*. Each "needlessly encourages" (390 U. S., at 583) pleas by subjecting the accused who seeks to have his guilt determined by jury trial to an "increased hazard" (*id.*, at 572) of capital punishment. Each "discourage[s]," "deter[s]" and "chill[s]" exercise of the interdependent rights not to plead guilty and to be tried by a jury. *Id.* at 581. And each thereby "needlessly penalizes the assertion of a constitutional right" (*id.*, at 583).

This conclusion follows *a fortiori* from the recent decision in *North Carolina* v. *Pearce*, —— U. S. ——, 23 L. Ed. 2d 656 (1969). There the Court dealt with the problem of increased sentences following a successful appeal and unsuccessful retrial. The Court, acknowledging that it had

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Jersey have done here. We are not on the penumbra of the unconstitutional condition-penalty doctrine where it might be said that the penalty is relatively insubstantial and further that compelling interests of the State justify its imposition. Here the defendant is called upon to bargain his *life* as a condition to exercising his constitutional rights. As Mr. Justice Frankfurter once stated for the Court: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U. S. 375, 391 (1955). For varying exemplifications of the principle, *see*, e.g., *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Stein* v. *New York*, 346 U. S. 156, 196 (1952); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *Fay* v. *Noia*, 372 U. S. 391, 439-40 (1963). *Jackson* does not require the wholesale invalidation of plea bargaining. It *does*, however, compel a recognition that the forfeiture of life is a penalty which may not be imposed on the exercise of the fundamental constitutional right to deny and contest guilt on a capital charge. See Note, 54 Cornell L. Rev. 448, 452 (1969).

"never held that the States are required to establish avenues of appellate review," held that once established, those avenues must be kept open and free of unreasoned distinctions. The Court continued:

> "Where . . . the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to exercise' constitutional rights, 'would be patently unconstitutional.' *United States* v. *Jackson,* 390 U. S. 570, 581. And the very threat inherent in the existence of such punitive policy would, with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.,* at 582. See also *Griffin* v. *California,* 380 U. S. 690; cf. *Johnson* v. *Avery,* 393 U. S. 483. But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law." (*Id.,* at 4605.)[11]

In these cases, the right to deny and contest guilt—in contrast to the right of appeal—is specifically guaranteed by the United States Constitution. To subject a defendant to

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[11] *Amici,* unlike the defendants in the present cases, did not yield to the pressures to waive their right to trial. Each exercised that right and each has been sentenced to death—a sentence which might have been avoided at the cost of waiver of their federal rights. The question presented in their cases is whether by subjecting them to the death penalty, the state is " 'penalizing those who choose to exercise' constitutional rights, [which] 'would be patently unconstitutional.' " *North Carolina* v. *Pearce, supra,* quoting from *United States* v. *Jackson, supra,* at 581. That question is not presented here and we do not now consider it; it is treated extensively in the petitions for certiorari in *Forcella* (see pp. 19-38) and in *Childs* (see pp. 16-25).

a greater penalty because he has exercised that right is the more flagrantly unconstitutional.

(4) *The Statute Specifies the Death Penalty Unless the Jury Affirmatively Recommends a Lesser Sentence.*

In some states, North Carolina among them, the pertinent statute specifies that the penalty for a capital offense shall be death unless the jury affirmatively recommends a life sentence. The North Carolina Supreme Court thought that that form distinguished such procedures from the federal one invalidated in *Jackson,* where the applicable statute provided for imprisonment unless the jury voted for the death penalty.

The North Carolina Supreme Court offered no explanation as to how this might possibly have any bearing on the applicability of *Jackson's* condemnation of a procedure which unduly encourages the waiver of the constitutional right to deny and contest guilt, and we can think of none. The distinction, we suggest, is entirely semantic.[12] Congress in the Kidnaping Act established a selective process of making individuating judgments by which juries had the option between imposing a death sentence or a sentence of life or less. This is exactly the same option given North Carolina juries by the North Carolina Legislature; and the latter is as unconstitutional as the former. That conclusion does not depend on the phrasing of the jury's role in

[12] If the differences in statutory language were in fact of any consequence, then one would expect that a greater percentage of North Carolina defendants electing to stand trial would be given death sentences than federal capital defendants. The pressure, then, to waive the right to deny and contest guilt and seek the safe harbor of a guilty plea would be *greater* in North Carolina than in a pre-*Jackson* Federal Kidnaping Act case, and the unconstitutionality of North Carolina's procedures would be *a fortiori.*

deciding upon the sentence. Quite the contrary, it follows from the proposition that—however that role may be characterized—any defendant may avoid being subjected to the jury's death-sentencing option—but only at the cost of waiving his constitutional rights.

II.

A Guilty Plea, the Making of Which Was Substantially Motivated by the Threat of Imposition of the Death Penalty, Is Involuntary and Cannot Stand.

Introduction

Having concluded that the North Carolina death penalty statutes are unconstitutional,[13] we are nevertheless impelled to acknowledge, as did the Court of Appeals in *Alford*, that the presence of an unconstitutional sentencing system such as North Carolina's does not, of itself, resolve these cases. As the Court of Appeals said in *Alford*, "a defendant who has pleaded guilty when charged with a capital offense in North Carolina is not necessarily entitled to post-conviction relief as a matter of law." 405 F. 2d, at 347. The court recognized that this Court refrained in *Jackson* from holding that every plea of guilty to a Federal

[13] It should be noted that, effective March 25, 1969, the N. C. Legislature resolved the *Jackson* problem in its statutory scheme by repealing the provision permitting a guilty plea to a capital offense and fixing the penalty upon such a plea at life imprisonment. N. C. Session Laws, 1969, Ch. 117. See *State* v. *Atkinson*, —— N. C. ——, 167 S. E. 2d 241, 258-259 (1969). This resolution *in futuro*, of course, can have no effect on the capital sentencing provisions in force at the time of these defendants'—and of *amici's*—prosecutions, or on their constitutional posture. See note 4, *supra*.

Kidnaping Act charge was involuntary.[14] The question of the validity of such guilty pleas is, we submit, one of fact; it cannot be resolved other than by a full and fair evidentiary hearing, at which a sensitive and probing analysis of the motivations of the plea is made within the framework of the applicable presumptions and rules assigning the burden of proof.

We turn now to the issues controlling the pleas challenged in the cases at bar. In subpart A of this section, we discuss the settled requirement that a guilty plea must be knowing and "voluntary," and the application of that principle to a case in which the threat of the death penalty has played a role in eliciting such a plea. In subpart B, we offer a suggested approach for testing guilty pleas made in cases such as these to determine whether the threat of the death penalty has deprived the plea of its voluntary quality.

A. *The Threat of the Death Penalty May Deprive a Guilty Plea of Its Voluntary Character.*

This Court has long been concerned (*see, e.g., Kercheval* v. *United States,* 274 U. S. 220 (1927)) to insure that guilty pleas be not made involuntarily. The question of voluntariness of a plea is a federal one (*Boykin* v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274 (1969), as is any question of the waiver of federally secured rights. *E.g., Douglas* v. *Alabama,* 380 U. S. 415 (1965); *Brookhart* v. *Janis,* 384 U. S. 1, 4 (1966); *O'Connor* v. *Ohio,* 385 U. S. 92 (1966). Special

[14] "[T]he fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U. S., at 583.

caution regarding the guilty plea is entirely fitting, for a guilty plea constitutes a waiver of *all* constitutionally secured procedural guarantees (see pp. 15-16, *supra*); thus this Court recently observed that a guilty plea "demands utmost solicitude of which courts are capable" (*Boykin* v. *Alabama, supra,* at 280) to ensure that the waiver is truly voluntary.

The cases prohibiting involuntary pleas do not confine themselves to coercion by physical force or threats of violence; the inducement deemed so great to vitiate a plea "can be 'mental as well as physical;' 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama,* 361 U. S. 199. . . . Subtle pressures (*Leyra* v. *Denno,* 347 U. S. 556; *Haynes* v. *Washington,* 373 U. S. 503) may be as telling as coarse and vulgar ones." *Garrity* v. *New Jersey,* 385 U. S. 493, 496 (1967).

Some pressures are deemed too great to permit their intrusion into the process by which the defendant determines whether to exercise his constitutional right to deny and contest guilt or to enter a plea of guilty. The prospect of an apparently unavoidable deprivation of constitutional rights at trial, for example, may be sufficient to destroy the voluntariness of the plea, as where a defendant pleads guilty in the face of a trial wherein he is threatened by an unconstitutionally obtained confession. *E.g., United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2nd Cir. 1969) (en banc); *United States ex rel. Collins* v. *Maroney,* 382 F. 2d 547 (3rd Cir. 1967); *Smith* v. *Wainwright,* 373 F. 2d 506 (5th Cir. 1967); *Carpenter* v. *Wainwright,* 372 F. 2d 940 (5th Cir. 1967); *Murphy* v. *Wainwright,* 372 F. 2d 942 (5th Cir. 1967); *Doran* v. *Wilson,* 369 F. 2d 505 (9th Cir.

1966); *Ellis* v. *Boles,* 251 F. Supp. 1021 (N. D. W. Va. 1966); *United States ex rel. Cuevas* v. *Rundle,* 258 F. Supp. 647 (E. D. Pa. 1966). Misrepresentations by the prosecutor (for example, as to his ability to insure the defendant a particular sentence) are another example of circumstances which will warrant setting aside a plea of guilty. *E.g., Machibroda* v. *United States,* 368 U. S. 487 (1962); *Walker* v. *Johnston,* 312 U. S. 275 (1941); *Dillon* v. *United States,* 307 F. 2d 445, 449 (9th Cir. 1962); *Teller* v. *United States,* 263 F. 2d 871 (6th Cir. 1959). The same is true of unkept judicial promises of leniency. *E.g., Smith* v. *United States,* 321 F. 2d 954 (9th Cir. 1963); *United States ex rel. Elksnis* v. *Gilligan,* 256 F. Supp. 244 (S. D. N. Y. 1966) (Weinfeld, *J.*); *cf. Workman* v. *United States,* 337 F. 2d 226 (1st Cir. 1964).

Equally impermissible are prosecutorial threats to prosecute the spouse or a close friend of the defendant unless he pleads guilty. *Johnson* v. *Wilson,* 371 F. 2d 911 (9th Cir. 1965); *United States* v. *Glass,* 317 F. 2d 200 (4th Cir. 1963); *Conley* v. *Cox,* 138 F. 2d 786 (8th Cir. 1943); *cf. Teller* v. *United States, supra.* Indeed, statements of the trial judge to the effect that if the defendant elects to stand trial and is convicted, he will be given the maximum sentence have been found to invalidate a guilty plea as a matter of law. *Euziere* v. *United States,* 249 F. 2d 293 (10th Cir. 1957); *United States* v. *Tateo,* 214 F. Supp. 560 (S. D. N. Y. 1963).

Of course guilty pleas, properly interposed, are an essential ingredient of the efficient administration of justice. What these cases teach, however, is that certain kinds of inducements are too pressureful, too insensitive of the right of defendants to elect freely whether or not to stand trial.

Those inducements, for that reason, do not pass constitutional muster. It is in this context that the role of the death penalty must be assessed.

Much of the analysis has already been performed by this Court in *United States* v. *Jackson, supra.* This Court there found that statutes such as North Carolina's "needlessly encourage" (390 U. S., at 583) guilty pleas and, as we show in Part I, *supra,* are unconstitutional. Identification of the potentially coercive force of the death penalty in *Jackson* was in accordance with an increasing recognition that the risks of standing trial are "made particularly perilous in the context of [a] . . . charge with a possible death penalty." *United States ex rel. Ross* v. *McMann,* 409 F. 2d 1016 (2d Cir. 1969) (en banc). *Accord*: *Smith* v. *Wainwright,* 373 F. 2d 506, 507 (5th Cir. 1967) ("He was told that if he pleaded not guilty, the confession would place him in danger of the electric chair"); *Carpenter* v. *Wainwright,* 372 F. 2d 942 (5th Cir. 1967); *United States ex rel. Cuevas* v. *Rundle,* 258 F. Supp. 647 (E. D. Pa. 1966).

It bears emphasis that the constitutionality of a fairly administered system of plea bargaining is not implicated by a recognition of the coercive quality of the threatened imposition of the death penalty. See note 10, *supra.* All that need be determined here is that no defendant may be compelled to gamble with his life to secure his constitutional right to a trial; the state may not use the death penalty as the basis for inducing guilty pleas.

B. *Standards for Determining the Validity of a Potentially Death Penalty-Induced Guilty Plea.*

We begin from the premise that in each of these cases the plea was entered within the framework of a statutory system of differential sentencing in capital cases which is unconstitutional. See Part I, *supra.* The suspicion is in-

evitable, and entirely fitting, that the decision of each defendant to enter a plea of guilty was motivated by a desire to take advantage of the differential sentencing scheme enacted by the North Carolina Legislature and thereby avoid the death penalty. Each of these pleas, then, is constitutionally suspect. See Part II(A), *supra.*

Boykin v. *Alabama,* —— U. S. ——, 23 L. Ed. 2d 274 (1969) compels the setting aside of any such plea where the record lacks "an affirmative showing that [the plea] was intelligent and voluntary." *Id.,* at 279. These cases are undeniably stronger ones for insisting upon such a requirement than was *Boykin,* in which (as the dissenters pointed out, see *id.* at 281) there was no specific allegation that Boykin's plea was involuntary and, certainly, no defects in the statutory framework within which the plea was entered that might raise a presumption (or even suspicion) that his plea was other than voluntary. Yet the Court insisted that any guilty plea, constituting as it does a waiver of *all* constitutionally secured procedural safeguards (see pp. 15-16, *supra*), be supported by an affirmative showing on the record that the plea was knowing and voluntary.[15]

[15] We do not overlook that this Court has not yet determined whether *Boykin* is to be given retroactive application. However that question may be resolved (and presumably *Halliday* v. *United States,* 394 U. S. 831 (1969) (per curiam) suggests that the outcome may well be that it will not be retroactively applied), these pleas should not be allowed to stand. Unlike the *Boykin* and *Halliday* cases, there was here, as we have said, an unconstitutional statutory scheme within which the pleas in each of these cases were entered, as a result of which each is presumptively bad. These circumstances focus our concern as to the constitutionality of these pleas of guilty far more narrowly than is the case as to guilty pleas generally, entered in a less coercive framework. While the Court in *Halliday* could thus conclude that the other remedies available to the relatively rare defendant whose guilty plea may be invalid offered sufficient protection, the same cannot be said in states such as North Carolina where guilty pleas in capital cases are presumptively involuntary because of the coercive force of the differential sentencing system.

In neither of these cases[16] does it affirmatively appear from the record that the plea was other than impelled by a desire to avoid the death penalty, and for that reason neither plea should be allowed to stand.

At the least, a defendant who has entered a plea within a statutory framework such as North Carolina's is entitled to an evidentiary hearing at which the voluntariness of his plea is determined. Conceivably, it might be shown at such a hearing that the plea was the product of wholly proper considerations. It will not do, however, simply to allow the defendant the opportunity to demand such a hearing and impose upon him the customary burden of proof imposed upon one seeking to set aside a conviction. Here the burden must be shifted, for the plea was entered in suspicious circumstances that render it presumptively bad. The likelihood that it was motivated by improper pressures is so great that the burden of showing that it was not must fasten upon the State. Cf. *Miranda* v. *Arizona,* 384 U. S. 436 (1966). This approach recognizes the constitutional values implicit in *Boykin,* while leaving it open to the State to show that, notwithstanding the inevitable suspicion that the plea was the improper product of the unconstitutional differential sentencing system, it was in fact motivated by different, and permissible, considerations.

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[16] In *Alford,* the record in the original state proceedings lends affirmative support to the contrary proposition, and of course that conclusion is fully supported by the collateral proceedings culminating in the determination of the Court of Appeals that the "incentive supplied to petitioner to plead guilty by the North Carolina statutory scheme was the primary motivating force to effect tender of the plea, especially since throughout the proceedings the petitioner has protested his innocence." 405 F. 2d, at 349. In *Parker,* there is nothing in the record of the proceedings at which he entered his plea which indicates that the plea was motivated by anything other than a desire to avoid the death penalty.

Application of these principles to the facts of the present cases leaves no doubt as to the outcome. *Alford* must be affirmed, the court below having affirmatively found after a plenary hearing that the plea was motivated "primarily" to avoid the death penalty and that the defendant had throughout insisted upon his innocence. The record amply supports this factual finding, and no reason appears for this Court to disturb it on appeal. In *Parker*, it does not appear that the courts of North Carolina considered the defendant's claim that his plea was improperly induced by the state's unconstitutional sentencing system in the light of the proper standards for trial of that issue suggested here. To the contrary, the North Carolina Court of Appeals seems simply to have concluded that the plea was voluntary because the North Carolina statute was *not* unconstitutional under *United States* v. *Jackson, supra*, a conclusion which is plainly unsupportable. Thus, the *Parker* case should be vacated and remanded for reconsideration, in light of this Court's determination that the North Carolina statutes provide an unconstitutional inducement to plead guilty, for an evidentiary hearing at which the State will be required to demonstrate affirmatively the voluntariness of the plea under the appropriate federal constitutional standards, or see it set aside.[17]

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[17] Such a holding would not necessarily imply retroactivity of *United States* v. *Jackson*. Compare note 15, *supra*. This Court would be resting its decision upon the long-settled law of the Constitution that an involuntary guilty plea is invalid. In testing the validity of the defendants' pleas, it would be drawing upon the insights and reasoning processes of *Jackson*, not the legal rule of that case, in the same fashion that the Court has applied retroactively the insights of *Miranda*, see *Davis* v. *North Carolina*, 384 U. S. 737 (1966), albeit not its rule, see *Johnson* v. *New Jersey*, 384 U. S. 719 (1966).

We do not develop this retroactivity question here because—whatever view be taken of the retroactivity of *Jackson* in guilty-plea cases such as those of the defendants in the cases at bar—entirely different considerations control the matter of *Jackson's*

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application to persons situated like *amici*, complaining of death sentences which would penalize them for their exercise of constitutional rights. See Petition for Writ of Certiorari in *Forcella and Funicello* v. *New Jersey, supra,* at 36-37; see also note 4, *supra.*

In The

Supreme Court of the United States

October Term, 1970

No. 14

STATE OF NORTH CAROLINA
Appellant,

v.

HENRY C. ALFORD,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPELLANT'S SUPPLEMENTAL BRIEF

Joined in and Adopted by the States of Arkansas, Delaware, Illinois, Kentucky, Mississippi, and Montana, The Virgin Islands, and The National District Attorneys Association, Appearing as Amici Curiae.

ARGUMENT

PETITIONER'S GUILTY PLEA WAS CONSTITUTIONALLY VALID UNDER THE STANDARDS ENUNCIATED IN PARKER v. NORTH CAROLINA, 397 U.S. 790 (1970); BRADY v. UNITED STATES, 397 U.S. 743 (1970).

Oral argument was heard in this case on November 17, 1969. Subsequently, on April 27, 1970, this Court restored the case to the calendar for reargument. 397 U.S. 1060 (1970). One week after restoring the case to the calendar, two cases, PARKER v. NORTH CAROLINA, 397 U.S. 790 (1970) and BRADY v. UNITED STATES, 397 U.S. 743 (1970) were decided which bear heavily on the issue now before the Court. By orders of this Court, 395 U.S. 974 (1969) and 395 U.S. 976

(1969), PARKER and BRADY were argued orally immediately following the original oral argument of the present case.

The petitioner in PARKER was indicted under North Carolina law for a capital felony to which he pleaded guilty. By his plea the petitioner avoided a possible death sentence which could have resulted from a jury trial and received instead a mandatory sentence of life imprisonment.

In PARKER the petitioner contended that his guilty plea was involuntary ". . . because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury . . .", 397 U.S. at 794. This contention was rejected on the authority of BRADY v. UNITED STATES, supra, in which this Court determined ". . . that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized when there is a jury trial." 397 U.S. at 795.

For pleas to be "otherwise valid" they "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." BRADY, supra, 397 U.S. at 748. If so made, a plea will not be rendered invalid because it was "encouraged by the fear of a possible death sentence." BRADY, supra, 397 U.S. at 747.

In the case now before the Court, petitioner's plea has been subjected to judicial scrutiny and has been found voluntary and intelligent. HENRY C. ALFORD v. STATE OF NORTH CAROLINA, No. C-112-G-65 (M.D. N.C. September 3, 1965), A. pp. 12-18; HENRY C. ALFORD v. STATE OF NORTH CAROLINA, Misc. No. 220 (4 Cir. August 3, 1966) (Memorandum Decision by Chief Judge Haynsworth), A. pp 19-20. We submit that the findings below clearly indicate that petitioner's plea was "otherwise valid" under the standards set forth in BRADY, supra.

In BRADY the Court laid great stress on competent assistance of counsel in assuring that guilty pleas would be "otherwise valid". Counsel was relied on to serve two critical purposes: first, to act as a shield against coercive influences which would rob the plea of its voluntariness, and second, as a guide to insure as nearly as possible that the defendant knows the consequences likely to result from his decision on the plea.

In the present case petitioner's representation by court-assigned counsel has been found adequate twice in the Federal Courts and once in the State Courts. See Order of Judge Frank M. Armstrong, denying State post conviction relief, dated March 19, 1965, relevant portions of which are quoted on pages 25-26 of Appendix; HENRY C. ALFORD v. STATE OF NORTH CAROLINA, Misc. No. 220 (4 Cir. August 3, 1966), A. pp. 19-20; HENRY C. ALFORD v. STATE OF NORTH CAROLINA, No. C-98-G-67 (M.D. N.C. June 1, 1967), A. pp. 23-26.

The State Court findings adopted by the Federal District Court in HENRY C. ALFORD v. STATE OF NORTH CAROLINA, No. C-98-G-67 (M.D. N.C., June 1, 1967), make it plain that counsel did all that was possible in assuring that his client's plea was both voluntary and intelligent:

> "That before the plea was entered, Fred G. Crumpler, Jr., who is an able trial lawyer, with extensive experience in the trial of criminal cases, *made a thorough investigation of the case, including the questioning of the investigating officers, all other witnesses for the State, and other persons who appeared to have some information.* That the said attorney contacted all witnesses named to him by the defendant, except a person designated as 'Jap', who could not be located; that the said attorney found that none of the witnesses could give testimony helpful to the defendant, but that all of their testimony was detrimental to the defendant. That the said attorney further found that the evidence against the defendant was overwhelming

and that the petitioner was confronted with a very serious case of murder. *That the said attorney discussed the matter with the petitioner on several occasions, and advised him of the testimony that the witnesses would give against him, and also advised him of the possible verdicts that a jury could render in the case.*" (Emphasis added) A. p. 25.

It thus appears from the State Court findings that through counsel's diligent investigation petitioner was effectively shielded from any "coercive impact of a promise of leniency." 397 U.S. at 754. And it further appears that counsel's advice as to possible verdicts and as to the strength of the State's case acted to assure that petitioner's plea was made intelligently. Just as in BRADY there is no evidence here that petitioner "did not or could not, *with the help of counsel* rationally weigh the advantages of going to trial against the advantages of pleading guilty." 397 U.S. at 750 (Emphasis added). cf. McMANN v. RICHARDSON, 397 U.S. 759 (1970).

Faced with the overwhelming evidence against him, petitioner's choice was rational. Clearly under all the circumstances of this case, petitioner's plea meets the test adopted in BRADY:

> "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)." 397 U.S. at 755 (citations omitted).

II.

There is a factual difference between the present case, on one hand, and PARKER and BRADY on the other. The peti-

tioners, PARKER and BRADY, both admitted that they had in fact committed the crimes charged before their guilty pleas were accepted. In the case now before the Court, the petitioner maintained his innocence in the trial court while continuing to restate his desire to plead guilty. It could be urged that petitioner's failure to admit his guilt removes the present case from the holding of PARKER and BRADY. Such a suggestion was in fact made by the United States Court of Appeals for the Fourth Circuit. WILSON v. NORTH CAROLINA, ... F. 2d ....., n. 6 (4th Cir., No. 13,339, July 15, 1970) *(en banc)*.

A fair reading of BRADY does disclose that the Court there relied significantly on petitioner's admission of guilt, and the opinion contains dicta from which it might be inferred that had BRADY maintained his innocence the holding would have been otherwise. That is not to say, however, that petitioner in the present case is entitled to relief.

In U.S.A. v. TUCKER, 425 F. 2d 624 (4 Cir. 1969) the Fourth Circuit was faced with a situation analogous to the one now before this Court. There the defendant in a criminal prosecution who had previously tendered a plea of guilty was later given an opportunity to plead anew. At the second proceeding he again pleaded guilty but at the same time professed his innocence. Finding that the second proceeding failed to supply a factual basis for acceptance of defendant's plea, the Court of Appeals remanded the case for a determination of whether the plea had been entered voluntarily and knowingly.

Assuming that an admission of guilt is necessary to the holding in PARKER and BRADY, it might appear that a remand for determination of voluntariness and intelligence would be appropriate in the present case. Here, however, as noted above, lower courts have already determined that petitioner's plea was entered voluntarily and knowingly. Whatever the reasons for petitioner's reluctance to admit his guilt, these judicial determinations that petitioner's plea was consti-

tutionally valid should be afforded due consideration.

Furthermore, in light of the overwhelming evidence presented against him at trial, a full transcript of which is attached as an appendix to this supplemental brief, there can be no doubt that an adequate basis in fact was established to support petitioner's plea. Surely, this Court's expectations expressed in BRADY that "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel . . .", 397 U.S. at 758, have been met in this case. The fact that petitioner refused to admit his guilt should not be made a point of distinction in the face of clear findings that petitioner's plea was both voluntary and intelligent.

Respectfully submitted,

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APPENDIX

NORTH CAROLINA	)	IN THE SUPERIOR COURT
	)	
FORSYTH COUNTY	)	DECEMBER 2, 1963 TERM

	)	
	)	
STATE OF NORTH CAROLINA	)	
	)	*TRANSCRIPT*
-vs-	)	*OF*
	)	*PROCEEDINGS*
HENRY C. ALFORD	)	
	)	
	)	

APPEARANCES OF COUNSEL

FOR THE STATE: *HARVEY A. LUPTON*, Solicitor.

FOR THE DEFENDANT: *FRED G. CRUMPLER, JR.*, of the firm of White, Crumpler & Powell

HEARD before the Honorable Walter E. Johnston, Jr., Judge Presiding over the December 2, 1963 Criminal Term of Forsyth Superior Court.

The defendant, Henry C. Alford, being charged with murder in the first degree involving the death of Nathaniel Young, through his attorney entered a plea of guilty to second degree murder.

[1]

MR. LUPTON: Your Honor, in this case Henry C. Alford is charged with the murder of Nathaniel Young

on or about the 22nd day of November, 1963. Henry C. Alford, what is your plea?

MR. CRUMPLER: We tender a plea of guilty to second degree murder.

THE COURT: Let the record show that when the case was called for trial the defendant, through his attorney, tendered to the State a plea of guilty to second degree murder, which plea is accepted by the State.

MR. CRUMPLER: Thank you, Your Honor.

MR. LUPTON: Your Honor, I believe, if it's satisfactory with you, I'll put the detective on the stand first.

THE COURT: All right.

E. I. WEATHERMAN, being first sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. LUPTON:

Q. You are E. I. Weatherman, Detective in the Police Department?

A. Yes sir, that's correct.

[2]

Q. Now, go ahead and tell us what you learned in your investigation and tell us what each one of the witnesses told you, sir.

A. About 9:08 P.M., 11-22-63, Gilmore's Funeral Home notified the station that they had a request to pick up a person at a shooting on Claremont Avenue. As a consequence of this, Detective Pinkston went to the Kate Bitting Hospital and there learned that Nathaniel Young, male, colored, age forty, 1409 East 7½ Street was dead on arrival and that Dr. Vreeland had ruled that death was due to a

gunshot wound which had entered the lower part of the heart on the left side of the chest. We then contacted James Teams, Eliza Toney, and others, who stated that they were at the home of Nathaniel Young at 1409 East 7½ Street around 8:00 o'clock on the 22nd, and that Henry C. Alford came in the house with a white girl, Georgia Lee Holder; that Alford and Georgia Lee went to the kitchen and that they got a drink of whiskey apiece; that they hugged and kissed back there and bought maybe two drinks of liquor; that the jukebox was playing and that Georgia Lee danced with Alford and one or two other colored males, and that Alford then came back in the front room and gave Nathaniel a dollar, stating that he

[3]

wanted to use the bedroom. James Teams stated that he was in a chair near the bedroom and that Alford called Georgia Lee and they went into the bedroom and that Alford said that that was the last dollar that he had, and that Georgia Lee stated that he would have to have more than that and that he would—that they would have to come out of the room; that they stayed there about four or five minutes after that.

Q. She was a white girl?

A. That's right. They stayed there about four or five minutes and Alford said to Georgia Lee, said, "Let's go," and Georgia Lee said, "No, I'm not going. I'm going to stay here." Alford stated, "Well, you came here with me and you're going to leave with me," and he got ahold of her and attempted to pull her out of the chair and James stood up and said, "She don't have to go with you if she don't want to, she can stay here," and that Alford stated then that she came with him and that she was going to leave with him, and that Nathaniel said that he wasn't going to have anything in his house, that she could stay there if she wanted to. Alford then grabbed the coat of

Georgia Lee and went out the door. Nathaniel and Rudolph Harris ran out the door

[4]

after him and they returned in just a short time and stated that they were unable to catch Alford and get the coat back. They were standing around in the room, the rest of them, and in about ten or fifteen minutes there was a knock on the door and Nathaniel asked who was at the door and said somebody mumbled something that they couldn't understand and that Nathaniel opened the door and when he had it opened some short distance, some eight to twelve inches, there was a blast and Nathaniel fell to the floor. James Teams said that he ran out the door shortly but he was unable to see anyone around. We then contacted Ruby McGill, 1112 East 10½ Street, where Alford had been living, and Ruby—as a consequence of an interview with her—stated that she and Henry had been living together for some three years; that they were at this address about five months; that Henry left around dark, stating that he would be back in a few minutes; that about two and a half to three hours later he came back in and stated that he was breathing hard; appeared to have been running, and stated that, "God-damn son-of-a-bitches been running me and I'm going back and kill him." She stated that at that time he said Nathaniel Young, and that he repeated it a couple or three

[5]

times, that he was going back and kill the son-of-a-bitch and the other fellow with him also. She stated that he got his shotgun out of the wardrobe and four shells; that she and Shirley asked him not to, told him there was no use in that, and said that he kept repeating that he was going back and that he went out the door. We talked to Betty Jean Robinson, who stated that she was on the porch of a store at 1202 10½ Street, which is a little better—about a

half a block from the home—in the direction of Nathaniel Young's home, and she stated that she and Paul Hill was standing on the porch and Henry C. Alford came by them with a gun. In her statement to us, Ruby McGill stated that after he left with the gun, that he came back in approximately thirty to thirty-five minutes and stated that—said, "Honey, I done killed that Nathaniel and I'm going to leave you with the furniture." She said, "You don't have no business killing any man," and he said, "Yes, I killed that god-damn son-of-a-bitch. I'm not going to have anyone to kill me. I went to the door and when I shot him he just turned his head around and fell on the floor."

Q. He said he shot him?

A. Then we talked with Shirley. She stated that she

[6]

was there; that she asked him not to go down there and he told her to mind her own business. While we was attempting to pick up Alford in regard to this we went to the home of Sidney Lackey, who lives down a couple houses across the street, and we first went to his home around 11:00 o'clock and asked him if Henry had been there. He said, after waking him, said that he had come in there and told him if the officers come looking for me tell them that I haven't been here. And I talked with Sidney later and he stated that after we left he went out and found Alford and asked him why we was looking for him and he told him he shot a man. Betty Robinson, in talking with her, she stated that she went to Alford's home after we were there—and we carried Ruby McGill to the station—that she went there around 12:00 o'clock and that Henry C. Alford was there and he gave her a coat—and the coat has been identified as the one that Georgia Lee Holder had—and that they went out and he bought her two drinks of whiskey which he paid a dollar and a half for; that he asked her for her address and her full name;

stated that he had shot a man and that he would be gone a long time. We arrested Henry C. Alford about 1:00 o'clock at 11th and Cleveland Avenue the same

[7]

night. He stated to us that he went to the home of Nathaniel Young with Georgia Lee Holder and that the statements of the other witnesses was true up to the time he went home; that when he went home that he did not return.

Q. Well then, he admitted what had taken place with reference to Georgia Lee Holder; is that right?

A. That's right. And Georgia Lee Holder, we talked with her and she stated that was true.

Q. He paid $1 for the room to Nathaniel?

A. That's right, got Georgia Lee Holder in the room.

Q. And something was said about him not having any more money and she would not have anything more to do with him?

A. That's correct.

Q. And then the argument ensued and Nathaniel told him to get out?

A. Well, he didn't tell him that he had to get out.

MR. LUPTON: Take the witness.

CROSS-EXAMINATION

BY MR. CRUMPLER:

Q. Mr. Weatherman, I believe when you found Henry, did he have a gun with him at that time?

A. No sir, he did not.

Q. Where did you locate the gun?

[8]

A. In the wardrobe at his home, the home of he and Ruby McGill.

Q. Were there—did he have any shells with him or in—

A. There was two shells turned over that Ruby stated was in the home.

Q. And as far as you can determine, no witnesses stated there was more than one shot fired?

A. One shot was fired.

Q. The examination of the gun showed that if the gun had been fired it had been cleaned; is that correct?

A. That's correct. When I talked to Henry he said, "My gun is clean."

Q. Right. Now, I believe also that Henry told you that at some time during the night that he had ridden in a cab?

A. Yes sir, that is true. We were looking for him in a cab.

Q. It was cab number 2?

A. I don't know.

Q. But in any event, the information was that he had in fact ridden in the cab but it was after the time—

A. That is correct.

Q. Do you know what kind of a shot was in the man's body?

[9]

A. No sir, I do not.

Q. What kind of a shot did the shells have themselves?

A. One of them didn't have any markings on it. It looked like maybe it was marked off, and the other was a number four, long range shell.

Q. They were different—the two shells were different?

A. Yes sir, in my opinion they were. There was no markings on one of them that I could find.

MR. CRUMPLER: No further questions.

A. He stated that he had bought these shells from a man at the store and that he just got them out of a large box where he had twelve guage shells. And the gun, in my opinion, smelled as if it had been recently fired.

THE COURT: All right. Step down.

MR. LUPTON: Your Honor, the State will tender the other witnesses.

THE COURT: Do you care to examine any of these witnesses, Mr. Crumpler?

MR. CRUMPLER: Your Honor, if the Court would allow me I would like to examine Sidney Lackey and possibly one more, and I'll be as brief as I can.

THE COURT: All right.

[10]

SIDNEY LACKEY, being first sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CRUMPLER:

Q. Your name is Sidney Lackey?

A. Yes.

Q. I believe you were at the home of Ruby McGill on the afternoon or night some time or another?

A. Yes, I was.

Q. And, Sidney, I'll explain to you why I'm asking you this question. There is some doubt in Henry's mind as to which

statement you made. Did Henry come there and get a gun at any time while you were there?

A. No. sir.

Q. And you don't have any knowledge about his having or his not having a gun?

A. No, sir.

Q. And the fact is, you never saw him leave with his gun and never heard him in an argument?

A. No.

Q. And the only knowledge that you have is the knowledge to the statement that he made to you that he had shot a man?

A. That's right.

[11]

Q. What time do you say the statement was made?

A. I'll say between 10:30 and 11:00.

Q. And where was the statement made, in his house or yours?

A. Mine.

Q. Sidney, did Ruby at any time run you away from the house for drinking?

A. Yes, she told me to get out.

Q. I believe there was a dispute over $3 that she said you owed her for some time?

A. No, sir.

Q. What was the dispute? Why did she ask you to leave?

A. I got into a fight with a fellow who walked in, wanted to know who I was and what I was doing there.

MR. CRUMPLER: No further questions, Your Honor.

MR. LUPTON: Come down.

THE COURT: Which other witness do you want to examine?

MR. CRUMPLER: This girl here, Your Honor.

SHIRLEY WRIGHT, being first sworn to state the truth, the whole truth and nothing but the truth, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. CRUMPLER:

Q. Shirley, what is your full name?

[12]

A. Shirley Wright.

Q. Were you in the house of Ruby McGill during the night or any time during the night?

A. I wasn't there too long.

Q. What other people were there during the time that you were there?

A. I don't know.

Q. Well, was Ruby McGill there?

A. Yes.

Q. Was Sidney Lackey there?

A. I don't know. I didn't see him.

Q. Was William Jackson there?

A. I don't know.

Q. Now, what time of the night was it that—I believe you stated that Henry came there and got a gun?

something like that. It wasn't too late.

A. Yes. I don't know what time it was. I guess about 9:00,

Q. How long was it before you saw Ruby again—I mean Henry—after that time?

A. I didn't see him any more. See, I left.

Q. You left after that?

A. After he came in and got the gun I left.

Q. Well, describe exactly what happened when he came to get the gun.

A. Well, when he come and got the gun I had went to the

[13]

back room and I come out and he had got the gun, you know, and he said, "I'm going to kill that nigger." So—he didn't say who, and I didn't ask him. I just told him no, you know, don't do it, and that's all he said to me.

Q. Did you see him get any shells at that time?

A. No, I didn't.

Q. What kind of gun, did you see?

A. No, I didn't. It was a long one.

MR. CRUMPLER: No further questions.

THE COURT: Well, is there anything else?

MR. CRUMPLER: Your Honor, if you'll give me just a second. Your Honor, the defendant wishes to take the stand.

THE COURT: All right. Let him be sworn.

HENRY C. ALFORD, being first duly sworn to state the truth, the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CRUMPLER:

Q. Henry, you have asked to take the stand in order that you

can make whatever statement you want. Go ahead and tell His Honor what you would like to say.

A. Yes, sir. Well, the night—well, on that night I was walking down to Nathaniel's house and met

[14]

Georgia, and she said she wanted a little drink of whiskey and couldn't find any, and I said that we'll go to a friend's house on 7½, and when he got there the radio was playing, or records somewhere, and we danced, and nobody was arguing in the house, and so—and I talked to Georgia and —I didn't have but $1 because I bought a half a pint of whiskey, and she wanted me to have more money. I got my check but I didn't have it with me. It was left in my wardrobe when I changed my work clothes. And I went to Claremont—I carried her coat—they got after me for the coat and then—they didn't get the coat. I went up to 7th Street and come back to Greenwood, and I come back down Greenwood and I went home, and I seen the check was in the billfold. I wanted to know—and I came back out and said—Ruby told me to go across the street, and so I collected her $3, and she had tried to collect it and he wouldn't give it to her, and there was no admission about no gun or shooting over there, and his girl friend he lives with came to the door and said, "The law is around over there at your house," and I said, "What are they over there for?" and she said she didn't know, and I said, "Well, let me go out the back door," and I went out the back door

[15]

and said, "I'm going to cash my check," and I got a cab and went to cash my check, and so when I come back I met Betty. Betty said the law had been to my house and got Ruby and the shotgun, and I said, "What was they doing with the shotgun?" and she said she didn't know, but that they had got Ruby and the shot-

gun. And so I give Betty a dime to call to the police headquarters and ask why Ruby was up there and see how much bond was she under. I thought she was going to jail for whiskey, but they didn't have no bond, and they asked her where is Henry C. Alford at, asked Betty on the phone, and we started up the street and—she said she didn't know—and we went up the street, going up Cleveland, and went to my house, and there wasn't no whiskey in the house but the gun was gone like she said, and so we went back across Cleveland and bought a drink of whiskey to her cousin's house and we came back, and I said, "Well, what are they going to do with her?" first, and I says, "You go down the street," and so I was walking down Cleveland and Betty went down towards the officers' car—she lives down that way about three doors from me —from where I live, and so I walked down there, and the officer came up by himself and he—and he called me—I walked on the

[16]

left-hand side of Cleveland and he said, "Hey fellow, what is your name?" and I told him, and he wanted to know where I was going, and I told him to Ruby McGill's, and I was walking on Cleveland and he drove up behind me and stopped me again and said for me to come here a minute in the car, and at that time he was by himself, and he walked around to the door and I got in the car, and he said, "What is your name?" and I told him, and he said, "Where do you live?" and I told him 1112 East 10½, and by that time I heard one of the officers talking on the two-way radio about Ruby saying I had on a black cap and black coat on the two-way radio, and some more officers come up, and right behind them come some more, and they stopped and—Joe McFadden and another one—that was four officers' cars at one time there, and Joe McFadden come over there and says, "That's Henry Alford," and they arrested me, and I pleaded guilty

on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.

MR. CRUMPLER: Your Honor, it's going to be

[17]

necessary—I have, as best as I could, set these facts out in this affidavit, but I want to ask him a few questions.

Q. Now, you have consulted with me on several occasions before we came to court?

A. Yes, sir.

Q. And that is two or three times for the last two or three terms?

A. Yes, sir.

Q. And during that time you have had the privilege of being —seeing me and also seeing your sister and the other friends that have been around—the right to visit you and help prepare your case?

A. Yes, sir.

Q. And, also, I have advised you, as your attorney, of the various degrees of murder and the difference between second and first degree and your rights of appeal and the Court's power and discretion in each of those cases?

A. Yes, sir.

Q. And including the right of a jury to find you not guilty, and to the right to plead before the Governor of the State of North Carolina?

A. Yes, sir.

Q. And you authorized me to tender a plea of guilty to

[18]

second degree murder before the Court?

A. Yes, sir.

Q. And in doing that, that you have again affirmed your decision on that point?

A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty.

THE COURT: Well, he says that you plead guilty to second degree murder.

A. Yes, sir.

BY THE COURT:

Q. Is that your desire now?

A. Yes, sir. I plead guilty on—from the circumstances that he told me.

MR. CRUMPLER: I don't know what to do with the man.

THE COURT: You are court-appointed?

MR. CRUMPLER: Yes, sir. Your Honor, if the Court would allow me I—

THE COURT: I want to ask him some questions myself up here.

BY THE COURT:

Q. You were born down in Rocky Mount on May 18, 1918,

[19]

weren't you?

A. Yes, sir.

Q. June 18, 1918?

A. Yes.

Q. Now, how many times have you served pentitentiary sentences in your life?

A. About three times.

Q. How many people have you been charged with murdering in your life?

A. One accident.

Q. Where was that?

A. In Virginia.

Q. Well, you killed that person? You served a sentence for that?

A. Yes, sir.

Q. How long did you serve for killing that man?

A. Six years.

Q. What was your sentence?

A. Ten.

Q. And you got out in six years?

A. Yes, sir.

Q. Well now, how many times have you been convicted of armed robbery?

A. Nine times. (NOTE: Nine times, or no times)

Q. What else have you been convicted of?

[20]

A. Whiskey and stuff like that.

Q. What did you serve on those?

A. I pulled time for hauling stolen goods in Robeson County.

Q. How much time did you make in that case?

A. Four years altogether.

Q. What else have you been convicted of?

A. I don't know.

Q. Well, you said you served three sentences.

A. Well, one was for forgery. I wrote some checks.

Q. How much time did you serve for forgery?

A. Two years.

Q. Well, you didn't come to Winston-Salem till 1960 did you?

A. No, sir.

Q. And since you came to Winston-Salem you have been convicted of carrying a concealed weapon here?

A. Here?

Q. Yes, on August 19, 1960.

A. Nothing but a pocket knife.

Q. Just a pocket knife?

A. Yes.

Q. Well, you were convicted of assault, charged in two cases of assault with a deadly weapon in 1960 when you came here weren't you?

[21]

A. No, sir. I don't know anything about that.

Q. Well, you were up before Judge Sams on October 2, 1963 for cursing and abusing an officer?

A. Yes sir, I was up for that.

Q. And you were found guilty of it.

A. Yes, I pleaded guilty.

Q. And you were up for disorderly conduct in October; is that right?

A. Yes.

Q. And you were up for assault on some woman in September; is that right?

A. Yes.

Q. And you have been convicted of driving an automobile intoxicated and driving after your license were revoked and violation of the prohibition law all since you came here in 1960?

A. Yes.

THE COURT: All right. Stand down.

MR. CRUMPLER: That is all of the evidence that I have on his behalf, Your Honor.

THE COURT: Well, let the defendant stand up. It is the judgment of the Court that he be confined in the State's Prison for a term of thirty years.

[22]

NORTH CAROLINA)
)
FORSYTH COUNTY)

CERTIFICATION

I, David G. Meddings, Official Court Reporter of the Superior Court for the Twenty-First Judicial District, do hereby certify the foregoing to be a true and complete Transcript of the Proceedings as taken and transcribed by me from my notes in the case of State of North Carolina vs Henry C. Alford, tried at the December 2, 1964 Criminal Session of Forsyth Superior Court.

Witness my hand this the 20th day of April, 1969.

David G. Meddings
Official Court Reporter

[23]

No. 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

STATE OF NORTH CAROLINA,

Appellant,

v.

HENRY C. ALFORD,

Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR APPELLEE

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ARGUMENT

THE APPELLEE'S PLEA OF GUILTY WAS NOT A VOLUNTARILY AND INTELLIGENT ACT, AND WAS THEREFORE INVALID.

This Court has long enunciated the principle that a guilty plea not voluntarily and intelligently entered is constitutionally invalid.[1] The record must affirmatively disclose that

[1] *E.g., Machibroda v. United States,* 368 U.S. 487 (1962); *Waley v. Johnston,* 316 U.S. 101 (1942); *Walker v. Johnston,* 312 U.S. 275 (1941); *Kercheval v. United States,* 274 U.S. 220 (1927).

such a plea was both "voluntary" and "intelligent." *Boykin v. Alabama,* 395 U.S. 238 (1969). It is submitted that the record in the present case establishes beyond question that the determination of the appellee, Henry C. Alford, to plead guilty was neither voluntary nor intelligent and that this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

The Court's opinions in *Brady v. United States,* 397 U.S. 742 (1970), and *Parker v. North Carolina,* 397 U.S. 790 (1970), which cases were originally consolidated for hearing with the present case, do not dictate a different decision in the present case from that rendered by the Fourth Circuit. In those cases, the Court held that a guilty plea entered under the statutory scheme establishing the possibility of the death penalty only in situations in which an accused pleads not guilty and demands a jury trial which was invalidated in *United States v. Jackson,* 390 U.S. 570 (1968), is nevertheless valid unless shown not to be the voluntary and intelligent act of the accused. The Court in *Brady* said that the determination of whether a plea is in fact voluntary and intelligent requires a consideration of "all of the relevant circumstances surrounding it." 397 U.S. at 749. Among the circumstances to be considered is the existence of the statutory scheme pronounced unconstitutional in *Jackson.* (As was argued in the appellee's original brief, the statutory scheme under which Alford was charged is substantially the same as that under the Federal Kidnaping Act which was before the Court in *Jackson.*)

The circumstances surrounding Alford's guilty plea were significantly different from those surrounding the pleas of Brady or Parker. The record clearly shows that Alford's will was overborne by the circumstances in which he found himself and that he was "so gripped by fear of the death penalty . . . that he did not and could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Brady v. United States,* 397 U.S. at 750.

Alford is a Negro with virtually no formal education. (Record, Vol. 1, Writ of Habeas Corpus filed May 4, 1967; Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, p. 24.) He was accused of murdering another Negro because of an argument arising over a white woman who was in the company of Alford at the time. Because of these facts—that the accused, a Negro, was in the company of a white woman in a Southern city—Alford was told by his attorney that the circumstances were "aggravated" and that he could be effected by "any prejudiced persons" who might be on the jury.[2] At the post conviction hearing, Alford's attorney denied actually having told Alford that if he did not plead guilty, he would surely get the death penalty, although the attorney did testify that he told

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[2] Q. Now, Mr. Crumpler, did you ever discuss with the defendant or tell the defendant that things would go bad for him because the woman involved was a white woman?

A. No, sir, I don't recall using the word, white. I explained to him that the facts were aggravated and that for that reason —the way the killing occurred, that in my opinion I didn't think the jury would look upon it favorably.

BY THE COURT:

Q. You gave him all of the information that you thought he ought to have in your opinion by representing him?

A. Yes, sir.

Q. If there was anything bad or good about the case, as you learned it, of course, you explained it to him?

A. Your Honor, I might add that in reference to that question that I discussed this matter with him. I explained to him that there were aggravated circumstances and that the jury would render a fair determination and that I had no way to predict their verdict. However, that with the statements given me by the State's witnesses and also the place that it had occurred, which wasn't one of the most commendable places in the county, and concerning if there was any prejudiced persons, that I could not tell who was prejudiced, and that that might affect him, and I brought out every fact that I thought the jury might determine, and I explained to him that I was not prejudiced, I had no feeling about it, and I was as truthful as I could be in representing him. (Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, pp. 14-15.)

Alford in his opinion he could not win the case and that the facts were aggravated.[3] It is clear that Alford in fact believed that under the circumstances he would receive the death penalty unless he pleaded guilty. At the trial itself, Alford took the stand at his own request and stated that he was innocent and that he "just pleaded guilty because they said if I didn't they would gas me for it, and that is all." (Appellant's Supplemental Brief at 20.) He repeated this assertion several times in response to questioning by his own attorney and by the court. (Appellant's Supplemental Brief at 20-21.) Alford reiterated his position at the post conviction hearing. (Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, p. 24.) This *Court* in Brady stated:

> "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be voluntarily expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and the likely consequences." 379 U.S. at 748 (footnotes omitted).

The record in the present case demonstrates that Alford has never admitted his guilt to the crime with which he was charged, either to the court or to his own attorney. Even at the trial at which the plea was entered, Alford continu-

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[3]See no. 2, supra; Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term p. 6.

ally asserted his innocence and qualified his plea as being submitted "because they said if I didn't they would gas me for it" and because "you all got me to plea guilty." His attorney testified at the post conviction hearing that Alford stated to him that he was not guilty. (Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, pp. 4, 12.)

A reading of the record reveals that Alford was torn between his desire to plead not guilty and the awesome alternative of risking the death penalty, a penalty he was convinced he would receive if he were tried by a jury.[4] He continually waivered between the two alternatives until finally, after having become convinced from statements of his attorney and of his sister of the inevitability of the death penalty, he consented to plead guilty. (Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, pp. 7-9, 24-25; Record, Vol. I at 12, Affidavit of Christian Greene.) And even at his trial, he felt compelled not to allow the guilty plea to go unqualified. The record portrays a man so caught up in this dilemma that it was virtually impossible for him voluntarily and intelligently to enter a plea of guilty. Even at the trial, his attorney stated to the court: "I don't know what to do with the man."[5] And yet, in the face of Alford's vacillation and obvious quandary, the court accepted the plea with very little comment or inquiry.

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[4]Under North Carolina, Alford did not have the option to plead not guilty and have a bench trial. *State v. Muse,* 219 N.C. 226, 13 S.E. 2d 229 (1941); *State v. Hill,* 209 N.C. 53, 182 S.E. 716 (1935).

[5]Appellant's Supplemental Brief at 21. At the post conviction hearing, Alford's attorney testified as follows:

Q. Now, at anytime did you make a statement to the Court that you didn't know what to do with the man?

A. I certainly did.

Q. And in that statement, Mr. Crumpler, did you mean at that time that you were not sure what plea you should enter for the man?

A. I meant simply this: that I had advised and consulted with him as far as I thought it best to, and in my opinion as much as I

It is well established that determination of whether a guilty plea is the voluntary and intelligent act of the accused requires a consideration of the state of mind of the defendant at the time the plea was made. This determination is often difficult, perhaps sometimes impossible. However, in the present case, the state of mind of Alford is vividly demonstrated by the record as being so overpowered by the circumstances in which he found himself that it was virtually impossible for him intelligently to enter a voluntary guilty plea. There can be little doubt that Alford's plea was in fact coerced by the existence of the North Carolina statutory scheme of imposing the death penalty under the circumstances of this case.

For the foregoing reasons and for the reasons stated in the appellee's original brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed and the case remanded for issuance of the writ of habeas corpus.

Respectfully submitted,

Doris R. Bray
Counsel for Appellee

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could, that under the circumstances I wasn't sure what the proper course was and I left it up to the Court to make that decision.

Q. And then, Mr. Crumpler, you were in doubt as to what position you were in as to what plea you were to enter if you left it up to the Court?

A. Would you repeat that?

Q. You didn't know what position you were in as to his plea did you?

A. I had no doubt of my position as to what his plea was at that time. I was doubtful of his position and for that reason I left it up to the Court to determine what his plea was. (Record, Proceedings of Post Conviction Hearing, Dec. 7, 1964 Term, pp. 8-9).

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTH CAROLINA *v.* ALFORD

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14. Argued November 17, 1969—Reargued October 14, 1970—Decided November 23, 1970

Appellee was indicted for the capital crime of first-degree murder. At that time North Carolina law provided for the penalty of life imprisonment when a plea of guilty was accepted to a first-degree murder charge; for the death penalty following a jury verdict of guilty, unless the jury recommended life imprisonment; and for a penalty of from two to 30 years' imprisonment for second-degree murder. Appellee's attorney, in the face of strong evidence of guilt, recommended a guilty plea, but left the decision to appellee. The prosecutor agreed to accept a plea of guilty to second-degree murder. The trial court heard damaging evidence from certain witnesses before accepting a plea. Appellee pleaded guilty, although disclaiming guilt, because of the threat of the death penalty, and was sentenced to 30 years' imprisonment. The Court of Appeals, on an appeal from a denial of a writ of habeas corpus, found that appellee's guilty plea was involuntary because it was motivated principally by fear of the death penalty. *Held:* The trial judge did not commit constitutional error in accepting appellee's guilty plea. Pp. 5–13.

(a) A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty. *Brady* v. *United States*, 397 U. S. 742. Pp. 5–6.

(b) *Hudson* v. *United States*, 272 U. S. 451, which held that a federal court may impose a prison sentence after accepting a plea of *nolo contendere*, implicitly recognized that there is no constitutional bar to imposing a prison sentence upon an accused

Syllabus

who is unwilling to admit guilt but who is willing to waive trial and accept the sentence. Pp. 9–11.

(c) An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. Pp. 11–12.

(d) The Fourteenth Amendment and the Bill of Rights do not prohibit the States from accepting pleas to lesser-included offenses. P. 13.

405 F. 2d 340, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., HARLAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment. BRENNAN, J., filed a dissenting opinion in which DOUGLAS and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1970

North Carolina, Appellant, v. Henry C. Alford. | On Appeal from the United States Court of Appeals for the Fourth Circuit.

[November 23, 1970]

Mr. Justice White delivered the opinion of the Court.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense under North Carolina law.[1] The court appointed an attorney to represent

[1] Under North Carolina law, first-degree murder is punished with death unless the jury recommends that the punishment shall be life imprisonment:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (1969).

At the time Alford pleaded guilty, North Carolina law provided that if a guilty plea to a charge of first-degree murder was accepted by the prosecution and the court, the penalty would be life imprisonment rather than death. The provision permitting guilty pleas in capital cases was repealed in 1969. See *Parker* v. *North Carolina*, 397 U. S. 790, 792–795 (1970). Though under present North Caro-

him, and this attorney questioned all but one of the various witnesses who appellee said would substantiate his claim of innocence. The witnesses, however, did not support Alford's story but gave statements that strongly indicated his guilt. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Alford's attorney recommended that he plead guilty, but left the ultimate decision to Alford himself. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder, and on December 10, 1963, Alford pleaded guilty to the reduced charge.

Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. Although there was no eyewitness to the crime, the testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim and returned home with the declaration that he had carried out the killing. After the summary presentation of the State's case, Alford took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so.[2] In response to the questions of his

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lina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge.

[2] After giving his version of the events of the night of the murder, Alford stated:

". . . I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members

counsel, he acknowledged that his counsel had informed him of the difference between second- and first-degree murder and of his rights in case he chose to go to trial.[3] The trial court then asked appellee if, in light of his denial of guilt, he still desired to plead guilty to second-degree murder and appellee answered, "Yes, sir. I plead guilty on—from the circumstances that he [Alford's attorney] told me." After eliciting information about Alford's prior criminal record, which was a long one,[4] the trial court sentenced him to 30 years' imprisonment, the maximum penalty for second-degree murder.[5]

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of his family and had been informed of his rights if he chose to plead not guilty. Alford then reaffirmed his decision to plead guilty to second-degree murder:

"Q [by Alford's attorney]. And you authorized me to tender a plea of guilty to second degree murder before the Court?

"A. Yes, sir.

"Q. And in doing that, that you have again affirmed your decision on that point?

"A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty.

[3] At the state court hearing on post-conviction relief, the testimony confirmed that Alford has been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issues of substance under *Boykin* v. *Alabama*, 395 U. S. 238 (1969), would be presented even if that case was held applicable to the events here in question.

[4] Before Alford was sentenced, the trial judge asked Alford about prior convictions. Alford answered that, among other things, he had served six years of a ten-year sentence for murder, had been convicted nine times for armed robbery, and had been convicted for transporting stolen goods, forgery, and carrying a concealed weapon. Appendix 9–11.

[5] See n. 1, *supra*.

Alford sought post-conviction relief in the state court. Among the claims raised was the claim that his plea of guilty was invalid because it was the product of fear and coercion. After a hearing, the state court in 1965 found that the plea was "willingly, knowingly, and understandingly" made on the advice of competent counsel and in the face of a strong prosecution case. Subsequently, Alford petitioned for a writ of habeas corpus first in the United States District Court for the Middle District of North Carolina and then in the Court of Appeals for the Fourth Circuit. Both courts denied the writ on the basis of the state court's findings that Alford voluntarily and knowingly agreed to plead guilty. In 1967, Alford again petitioned for a writ of habeas corpus in the District Court for the Middle District of North Carolina. That court, without an evidentiary hearing, again denied relief on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage of the proceedings and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty. On appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed on the ground that Alford's guilty plea was made involuntarily. 405 F. 2d 340 (1968). In reaching its conclusion, the Court of Appeals relied heavily on *United States* v. *Jackson*, 390 U. S. 570 (1968), which the court read to require invalidation of the North Carolina statutory framework for the imposition of the death penalty because North Carolina statutes encouraged defendants to waive constitutional rights by the promise of no more than life imprisonment if a guilty plea was offered and accepted. Conceding that *Jackson* did not require the automatic invalidation of pleas of guilty entered under the North Carolina statutes, the Court of Appeals ruled that Alford's guilty plea was involuntary

because its principal motivation was fear of the death penalty. By this standard, even if both the judge and the jury had possessed the power to impose the death penalty for first-degree murder or if guilty pleas to capital charges had not been permitted, Alford's plea of guilty to second-degree murder should still have been rejected because impermissibly induced by his desire to eliminate the possibility of a death sentence.[6] We noted probable jurisdiction. 394 U. S. 956 (1969). We vacate the judgment of the Court of Appeals and remand the case for further proceedings.

We held in *Brady* v. *United States*, 397 U. S. 742 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969); *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962); *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage. The

[6] Thus if Alford has entered the same plea in the same way in 1969 after the statute authorizing guilty pleas to capital charges had been repealed, see n. 1, *supra*, the result reached by the Court of Appeals should have been the same under that court's reasoning.

standard fashioned and applied by the Court of Appeals was therefore erroneous and we would, without more, vacate and remand the case for further proceedings with respect to any other claims of Alford which are properly before that court, if it were not for other circumstances appearing in the record which might seem to warrant an affirmance of the Court of Appeals.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible death sentence and to limit the penalty to the 30-year maximum provided for second-degree murder. Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. See *Brady* v. *United States, supra,* at 748; *McCarthy* v. *United States,* 394 U. S. 459, 466 (1969). Here Alford entered his plea but accompanied it with the statement that he had not shot the victim.

If Alford's statements were to be credited as sincere assertions of his innocence, there obviously existed a factual and legal dispute between him and the State. Without more, it might be argued that the conviction entered on his guilty plea was invalid, since his assertion of innocence negatived any admission of guilt, which, as we observed last Term in *Brady,* is normally "[c]entral to the plea and the foundation for entering judgment against the defendant . . . ." 397 U. S., at 748.

In addition to Alford's statement, however, the court had heard an account of the events on the night of the murder, including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention. Nor had Alford wavered in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it, the trial court proceeded to convict and sentence Alford for second-degree murder.

State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. Some courts, giving expression to the principle that "[o]ur law only authorizes a conviction where guilt is shown," *Harris* v. *State*, 76 Tex. Crim. 126, 131, 172 S. W. 975, 977 (1915), require that trial judges reject such pleas. See, *e. g.*, *Hulsey* v. *United States*, 369 F. 2d 284, 287 (CA5 1966); *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244, 255–257 (SDNY 1966); *People* v. *Morrison*, 348 Mich. 88, 81 N. W. 2d 667 (1957); *State* v. *Reali*, 26 N. J. 222, 139 A. 2d 300 (1958); *State* v. *Leyba*, 80 N. M. 190, 193, 453 P. 2d 211, 214 (1969); *State* v. *Stacy*, 43 Wash. 2d 358, 361–364, 261 P. 2d 400, 402–403 (1953). But others have concluded that they should not "force any defense on a defendant in a criminal case," particularly when advancement of the defense might "end in disaster . . . ." *Tremblay* v. *Overholser*, 199 F. Supp. 569, 570 (DDC 1961). They have argued that, since

"guilt, or the degree of guilt, is at times uncertain or elusive . . . [a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . ." *McCoy* v. *United States*, 363 F. 2d 306, 308 (CADC 1966). As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect." *State* v. *Kaufman*, 51 Iowa 578, 580, 2 N. W. 275, 276 (1879) (dictum). Accord, *e. g.*, *Griffin* v. *United States*, 405 F. 2d 1378 (CADC 1968); *Bruce* v. *United States*, 379 F. 2d 113, 119–120 (CADC 1967); *City of Burbank* v. *General Electric Co.*, 329 F. 2d 825, 835 (CA9 1964) (dictum); *State* v. *Martinez*, 89 Idaho 129, 138, 403 P. 2d 597, 602–603 (1965); *People* v. *Hetherington*, 379 Ill. 71, 39 N. E. 2d 361 (1942); *State ex rel. Crossley* v. *Tahash*, 263 Minn. 299, 307–308, 116 N. W. 2d 666, 671–672 (1962); *Commonwealth* v. *Cottrell*, 433 Pa. 177, 249 A. 2d 294 (1969). Cf. *United States ex rel. Brown* v. *LaVallee*, 424 F. 2d 457 (CA2 1970).[7]

This Court has not confronted this precise issue, but prior decisions do yield relevant principles. In *Lynch* v. *Overholser*, 369 U. S. 705 (1962), the defendant Lynch, who had been charged in the Municipal Court of the District of Columbia with drawing and negotiating bad checks, a misdemeanor punishable by a maximum of one year in jail, sought to enter a plea of guilty, but the trial judge refused to accept the plea since a psychiatric report in the judge's possession indicated that

[7] A third approach has been to decline to rule definitively that a trial judge must either accept or reject an otherwise valid plea containing a protestation of innocence, but to leave that decision to his sound discretion. See *Maxwell* v. *United States*, 368 F. 2d 735, 738–739 (CA9 1966).

Lynch had been suffering from "a manic depressive psychosis, at the time of the crime charged," and hence might have been not guilty by reason of insanity. Although at the subsequent trial Lynch did not rely on the insanity defense, he was found not guilty by reason of insanity and committed for an indeterminate period to a mental institution. On habeas corpus, the Court ordered his release, construing the congressional legislation seemingly authorizing the commitment as not reaching a case where the accused preferred a guilty plea to a plea of insanity. The Court expressly refused to rule that Lynch had an absolute right to have his guilty plea accepted, see *id.*, at 719, but inferred that there would have been no constitutional error had his plea been accepted even though evidence before the judge indicated that there was a valid defense.

The issue in *Hudson* v. *United States*, 272 U. S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of *nolo contendere*, a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.[8] The Court held

[8] Courts have defined the plea of *nolo contendere* in a variety of different ways, describing it, on the one hand, as "in effect, a plea of guilty," *United States* v. *Food & Grocery Bureau*, 43 F. Supp. 974, 979 (SD Cal. 1942), aff'd, 139 F. 2d 973 (CA9 1943), and on the other, as a query directed to the court to determine the defendant's guilt. *State* v. *Hopkins*, 27 Del. 306, 88 A. 473 (1913). See generally *Lott* v. *United States*, 367 U. S. 421, 426–430 (1961), 21 Am. Jur. 2d § 497. As a result, it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases.

Hudson v. *United States*, *supra*, was also ambiguous. In one place, the Court called the plea "an admission of guilt for the purposes of the case," *id.*, at 455, but in another, the Court quoted an English authority who had defined the plea as one "where a defendant, in a case not capital, doth not directly own himself

that a trial court does have such power, and except for the cases which were rejected in *Hudson*,[8] the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce* v. *United States*, *supra*, at 120 n. 20 (dictum). See, *e. g.*, *Lott* v. *United States*, 367 U. S. 421 (1961) (fraudulent evasion of income tax); *Sullivan* v. *United States*, 348 U. S. 170 (1954) (*ibid.*); *Farnsworth* v. *Zerbst*, 98 F. 2d 541 (CA5

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guilty. . . ." *Id.*, at 453, quoting 2 W. Hawkins, Pleas of the Crown 466 (8th ed. 1824).

The plea may have originated in the early medieval practice by which defendants seeking to avoid imprisonment would seek to make an end of the matter (*finem facere*) by offering to pay a sum of money to the king. See 2 F. Pollock & F. W. Maitland, The History of English Law 517 (2d ed. 1909). An early 15th-century case indicated that a defendant did not admit his guilt when he sought such a compromise, but merely "that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admittit per finem*)." *Anon.*, Y. B. Hill. 9 Hen. 6, f. 59, pl. 8 (1431). A 16th-century authority noted that a defendant who so pleaded "putteth hym selfe in *Gratiam Reginae* without anye more, or by Protestation that hee is not guiltie . . . ," W. Lambard, Eirenarcha 427 (2d ed. 1581), while an 18th-century case distinguished between a *nolo* plea and a jury verdict of guilty, noting that in the former the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt. *Queen* v. *Templeman*, 1 Salk. 55, 91 Eng. Rep. 54 (K. B. 1702).

Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.

[8] *Blum* v. *United States*, 196 F. 269 (CA7 1912); *Shapiro* v. *United States*, 196 F. 268 (CA7 1912); *Tucker* v. *United States*, 196 F. 260 (CA7 1912).

1938) (espionage); *Pharr* v. *United States*, 48 F. 2d 767 (CA6 1931) (misapplication of bank funds); *United States* v. *Bagliore*, 182 F. 2d 714 (EDNY 1960) (receiving stolen property). Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

These cases would be directly in point if Alford had simply insisted on his plea but refused to admit the crime. The fact that his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations of state law. See *Smith* v. *Bennett*, 365 U. S. 708, 712 (1961); *Jones* v. *United States*, 362 U. S. 257, 266 (1960). Cf. *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 630–632 (1959). Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Nor can we perceive any material difference between a plea which refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his

plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see *McCarthy* v. *United States, supra,* at 466–467 (1969),[10] its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.[11]

[10] Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see, *e. g., Griffin* v. *United States,* 405 F. 2d 1378, 1380 (CADC 1968); *Bruce* v. *United States,* 379 F. 2d 113, 119 (CADC 1967); *Commonwealth* v. *Cottrell,* 433 Pa. 177, 249 A. 2d 294 (1969); and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. See, *e. g., People* v. *Serrano,* 15 N. Y. 2d 304, 308–309, 206 N. E. 2d 330, 332 (1965); *State* v. *Branner,* 149 N. C. 559, 563, 63 S. E. 169, 171 (1908). See also *Kreuter* v. *United States,* 201 F. 2d 33, 36 (CA10 1953).

In the federal courts, Rule 11 of the Criminal Rules expressly provides that a court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

[11] Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute

Relying on *United States* v. *Jackson, supra,* Alford now argues in effect that the State should not have allowed him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances.[12] But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

The Court of Appeals for the Fourth Circuit was in error to find Alford's plea of guilty invalid because it was made to avoid the possibility of the death penalty. That court's judgment directing the issuance of the writ of habeas corpus is vacated and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, while adhering to his belief that *United States* v. *Jackson,* 390 U. S. 570, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

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right under the Constitution to have his guilty plea accepted by the court, see *Lynch* v. *Overholser,* 369 U. S. 705, 719 (1962) (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty. . . ." We need not now delineate the scope of that discretion.

[12] North Carolina no longer permits pleas of guilty to capital charges but it appears that pleas of guilty may still be offered to lesser included offenses. See n. 1, *supra.*

SUPREME COURT OF THE UNITED STATES

No. 14.—October Term, 1970

North Carolina, Appellant, v. Henry C. Alford | On Appeal from the United States Court of Appeals for the Fourth Circuit.

[November 23, 1970]

Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Last Term, this Court held over my dissent that a plea of guilty may validly be induced by an unconstitutional threat to subject the defendant to the risk of death, so long as the plea is entered in open court and the defendant is represented by competent counsel who is aware of the threat, albeit not of its unconstitutionality. *Brady* v. *United States*, 397 U. S. 742, 745–758 (1970); *Parker* v. *North Carolina*, 397 U. S. 790, 795 (1970). Today the Court makes clear that its previous holding was intended to apply even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt.

I adhere to the view that, in any given case, the influence of such an unconstitutional threat "must necessarily be given weight in determining the voluntariness of a plea." *Parker* v. *North Carolina*, 397 U. S., at 805 (dissent). And, without reaching the question whether due process permits the entry of judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime,[1] I believe that at the very

[1] The courts of appeals have expressed varying opinions on this question. Compare *McCoy* v. *United States*, 124 U. S. App. D. C. 177, 179–180, 363 F. 2d 306, 308–309 (1966); *Bruce* v. *United States*, 126 U. S. App. D. C. 336, 342 n. 17, 379 F. 2d 113, 119 n. 17

least such a denial of guilt is also a relevant factor in determining whether the plea was voluntarily and intelligently made. With these factors in mind, it is sufficient in my view to state that the facts set out in the majority opinion demonstrate that Alford was "so gripped by fear of the death penalty" [2] that his decision to plead guilty was not voluntary but was "the product of duress as much so as choice reflecting physical constraint." *Haley* v. *Ohio*, 332 U. S. 596, 606 (1948) (Frankfurter, J., concurring). Accordingly, I would affirm the judgment of the Court of Appeals.

(1967); *Griffin* v. *United States*, 132 U. S. App. D. C. 108, 109–110, 405 F. 2d 1378, 1379–1380 (1968); *Maxwell* v. *United States*, 368 F. 2d 735, 739 n. 3 (CA9 1966) (court may accept guilty plea from defendant unable or unwilling to admit guilt), with *United States ex rel. Crosby* v. *Brierly*, 404 F. 2d 790, 801–802 (CA3 1968); *Bailey* v. *MacDougall*, 392 F. 2d 155, 158 n. 7 (CA4 1968); *Hulsey* v. *United States*, 369 F. 2d 284, 287 (CA5 1966) (guilty plea is infirm if accompanied by denial of one or more elements of offense).

[2] *Brady* v. *United States*, 397 U. S., at 750.